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FROM CONCEPTION UNTIL BIRTH: EXPLORING THE MATERNAL DUTY TO PROTECT FETAL HEALTH

I. INTRODUCTION

“[I]n health there is liberty. Health is the first of all liberties[.]”¹

Kawana was in her third trimester of pregnancy when someone shot her in the abdomen in an attempt to kill the child developing within her womb.² Shortly thereafter, paramedics rushed Kawana to the hospital, where an emergency surgery saved her life.³ However, the bullet managed to obliterate the tiny child’s wrist, and as a result, the doctors were required to perform an emergency delivery.⁴ Kawana’s child grasped on to life for fifteen days before dying, its immature life extinguished as a result of the premature birth.⁵

Likewise, Rena was pregnant when an attacker kicked and stabbed her in the abdomen in an attempt to kill her unborn child.⁶ After the assault, paramedics transported Rena to a local hospital where doctors successfully treated her life-threatening injuries.⁷ However, the fetal monitor indicated trouble for the unborn child.⁸ Doctors quickly performed an emergency caesarean section in an attempt to save the dying child’s life.⁹ Unfortunately, Rena received too great a trauma for the child to withstand.¹⁰ A medical examiner found that her child lived for only ten minutes.¹¹

Although the facts of these two scenarios were similar, the legal outcomes were not. In the first example, the child’s mother fired the gun into her own abdomen, attempting to kill her unborn child. In *State v. Ashley*,¹² the Florida Supreme Court upheld the common law rule that

1. HENRI-FRÉDÉRIC AMIEL, AMIEL’S JOURNAL: THE JOURNAL INTIME OF HENRI-FRÉDÉRIC AMIEL v.1 232 (Mrs. Humphry Ward trans., The Macmillan Company 2d ed. 1907).

2. *State v. Ashley*, 701 So. 2d 338, 339 (Fla. 1997).

3. *Id.*

4. *Id.*

5. *Id.*

6. *United States v. Spencer*, 839 F.2d 1341, 1342 (9th Cir. 1988).

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. 701 So. 2d at 338 (Fla. 1997).

provided immunity to a pregnant woman for causing the death of her fetus.¹³ However, in *United States v. Spencer*,¹⁴ because the attacker was not the mother, the court reached a different result. Although the child survived for only ten minutes, it was considered, as the *Spencer* court articulated, the “killing of a human being.”¹⁵ Despite the fact each child was born alive in both of these examples, the two cases illustrate a discrepancy found in both the United States’ federal and state judicial systems regarding the woman and her fetus.¹⁶ Namely, even though a third party may be held criminally liable for causing injury or death to a fetus, the unborn child’s mother may not.¹⁷

The legal duty of a woman to protect the health of her developing fetus has become the subject of much controversy as medical advancements detail exactly how maternal conduct directly affects fetal health.¹⁸ Fueling this controversy is society’s growing demand for protection of the unborn¹⁹ *vis-à-vis* judicial recognition of women’s constitutional rights in reproductive matters.²⁰ Primarily, the controversy over fetal rights centers on the large number of women who abuse drugs during pregnancy²¹ and focuses on those children who are subsequently born with AIDS or various other medical defects.²² However, the controversy also centers on other

13. *Id.* at 341. Under the common law, an expectant mother may not be charged with abortion or attempted abortion, and therefore the charge of third-degree felony murder failed to set forth a crime for the lack of a predicate felony. *Id.* at 339-40.

14. 839 F.2d at 1341.

15. *Id.* at 1343.

16. Fetus is defined as “an unborn offspring of a vertebrate animal that is still in the uterus or egg, especially in its later stages and specif[ically] in humans, from about the eighth week after conception until birth[.]” WEBSTERS NEW WORLD COLLEGE DICTIONARY 525 (4th ed. 2000). The terms fetus and unborn child will be used interchangeably throughout this Note.

17. See generally Alan S. Wasserstrom, Annotation, *Homicide Based on Killing of Unborn Child*, 64 A.L.R.5th 671 (1998).

18. Thomas M. Fleming, Annotation, *Right of Child to Action Against Mother for Infliction of Prenatal Injuries*, 78 A.L.R.4th 1082, 1085 (1990).

19. See, e.g., Robin Toner, *Administration Plans Care Of Fetuses in a Health Plan*, N.Y. TIMES, Feb. 1, 2002, at A23. (reporting plan to promote prenatal care to low-income mothers by including fetuses within health care coverage). President George W. Bush’s administration said the move to “clarify” eligibility was an effort to allow states to provide coverage for prenatal care to low-income women who might not otherwise receive it. *Id.* The administration said the program allowed states to cover children from conception to age nineteen, thus allowing pregnant women to receive prenatal and delivery care. *Id.*

20. Fleming, *supra* note 18, at 1086-88. See also Part IV discussing the evolution of women’s constitutional rights in regards to reproductive matters.

21. See Joseph A. Califano, Jr., *Substance Abuse and Addiction—The Need to Know*, Am. J. Pub. Health Editorials (1998), at <http://www.apha.org/journal/editorials/edjan8.htm> (last visited Jan. 9, 2003) (noting that “[o]f the 4 million women who give birth each year, some 820,000 smoke cigarettes, 760,000 drink alcohol, and 500,000 use illicit drugs during pregnancy”).

22. JUDITH LARSEN ET AL., DRUG EXPOSED INFANTS AND THEIR FAMILIES: COORDINATING

harmful activities such as inadequate maternal nutrition, immoderate exercise, and sexual activity late in pregnancy,²³ which may also injure the fetus.²⁴

In response to these problems, prosecutors and judges in numerous states have begun to apply child abuse,²⁵ neglect, support, endangerment, and homicide statutes in an attempt to “deter, punish, or remedy” maternal conduct during pregnancy deemed “harmful” to the unborn child.²⁶ Furthermore, many prosecutors and judges have relied on statutory authority when requiring pregnant women to undergo medical procedures thought “necessary to preserve fetal life or health.”²⁷

RESPONSES OF THE LEGAL, MEDICAL AND CHILD PROTECTION SYSTEM 45 (1990). *See also* Fleming, *supra* note 18, at 1085 (noting that intravenous drug use by pregnant women has given rise to babies born with AIDS).

23. *See, e.g.*, *People v. Stewart*, No. M508197, slip op. (San Diego Mun. Ct. Cal. Feb. 26, 1987) (charging woman with fetal neglect for failing to heed doctor’s advice not to have sex with her husband while pregnant). Angela Bonavoglia, *The Ordeal of Pamela Rae Stewart*, MS., Aug. 1987, at 92, 95.

24. *See* Fleming, *supra* note 18, at 1085 (citing Carol Ann Simon, Note, *Parental Liability For Prenatal Injury*, 14 COLUM. J.L. & SOC. PROBS. 47 (1978)).

25. *See, e.g.*, *Whitner v. South Carolina*, 492 S.E.2d 777 (S.C. 1997) (holding that the word “child” as used in the child abuse and endangerment statute includes viable fetuses). Finding that a viable fetus is a person for purposes of the child endangerment statute, the court reasoned: “[I]t would be absurd to recognize the viable fetus as a person for purposes of homicide laws and wrongful death statutes but not for purposes proscribing child abuse.” *Id.* at 780. The mother in *Whitner* contended that several bills introduced in the South Carolina General Assembly addressing the specific issue of criminalizing prenatal substance abuse evidenced the legislature’s lack of intent to include viable fetuses as persons under the child abuse and neglect statutes. *Id.* at 781. The court rejected this contention, finding that an evaluation of legislative intent was unnecessary because the language of the statute and South Carolina case law clearly supported a finding that a viable fetus is a person for purposes of criminal statutes. *Id.* Thus, South Carolina became the first state to have its highest court uphold a conviction based on a mother’s use of illegal drugs during pregnancy. Regina M. Coady, *Extending Child Abuse Protection to the Viable Fetus: Whitner v. State of South Carolina*, 71 ST. JOHN’S L. REV. 667, 678 n.50 (1997).

26. Fleming, *supra* note 18, at 1985.

27. *Id.* *See also* Kathleen Rauscher, Comment, *Fetal Surgery: A Developing Legal Dilemma*, 31 ST. LOUIS U. L.J. 775, 778 (1987) (noting that some fetal defects, if not treated in utero, may cause substantial, permanent harm without causing death); *see also* *Jefferson v. Griffin Spalding County Hosp. Auth.*, 274 S.E.2d 457 (Ga. 1981) (authorizing plaintiff hospital to perform a caesarean section and any necessary blood transfusions upon the mother in the event she presented herself to the hospital for delivery of her unborn child); *Raleigh Fitkin-Paul Morgan Mem’l Hosp. v. Anderson*, 201 A.2d 537 (N.J. 1964) (compelling defendant mother to receive blood transfusions to save the life of her unborn child).

Another approach states have taken to preserve fetal health is through their *parens patriae* powers. Drago, *infra* note 109, at 170. *See also* *Prince v. Massachusetts*, 321 U.S. 158, 166 (1943) (recognizing the ability of the state through its *parens patriae* power to limit parental freedom and authority in matters concerning a child’s welfare). When an individual lacks the capacity to act in his or her own best interest, the state may use this common law power to exercise a paternalistic power over that individual. *Id.* (citation omitted). For example, the state has an “express obligation” to exercise its power over a physically or mentally abused minor and thus assume the role of the child’s protector. *Id.* (citing *In re Phillip B.*, 92 Cal. App. 3d 796 (1979) (stating that the state has a right to protect

This Note focuses on the ignited controversy centered on the nature and extent of a woman's legal duty for the protection and health of her unborn child.²⁸ Part II addresses the historical developments of fetal rights specifically in the areas of tort law and in criminal law. Part III examines the medical effects of teratogens²⁹ on the developing fetus. Part IV focuses on the constitutional obstacles facing protection for unborn children, namely the balance between a woman's right to procreational autonomy and privacy and the state's compelling interest in protecting the life and health of an unborn child. Part V examines the advantages and disadvantages of state intervention during a woman's pregnancy and of the criminalization of maternal conduct. Finally, Part VI proposes that state and federal governments enact legislation to penalize egregious prenatal behavior while implementing effective support programs aimed at promoting maternal health education and providing necessary treatment centers for addicted pregnant women.

II. BACKGROUND AND HISTORY OF FETAL RIGHTS

A. The Development of Fetal Rights in Tort Law and the Fall of Parental Immunity

Although courts established the theory of liability for prenatal injury to an unborn child over a century ago,³⁰ most courts are only beginning to determine whether they should recognize such a cause of action when the unborn child's mother causes the injury.³¹ Courts have increasingly

children)).

28. The goal of this Note will be to address why federal and local governments should compel a woman, who has decided to carry her fetus to term, to refrain from certain conduct that is likely to harm her unborn child. Although there remains much controversy regarding state intervention directly after birth, such as with breast-feeding by a drug-addicted mother and neonatal drug dependency, this Note focuses solely on state intervention during pregnancy and not on any negligence claims that may arise thereafter.

29. A teratogen is "an agent, as a chemical, or disease, that causes malformation of a fetus[.]" WEBSTER'S NEW WORLD COLLEGE DICTIONARY 1477 (4th ed. 2000).

30. See *Allaire v. St. Luke's Hosp.*, 56 N.E. 638 (Ill. 1900), *overruled by* *Amann v. Faidy*, 114 N.E.2d 412 (Ill. 1953) (allowing expectant mother to recover for injuries sustained to her fetus in hospital elevator accident).

31. Fleming, *supra* note 18, at 1085. Protection of fetuses has been most visible in recent years in the civil abuse context. See, e.g., MASS. GEN. LAWS ANN. ch. 119, § 51A (West 1993 and Supp. 2002) (including children "determined to be physically dependent upon an addictive drug at birth" within abuse statute); N.J. STAT. ANN. § 30:4C-11 (West 1997 and Supp. 2002) (protecting unborn through endangerment provisions); *In re Troy D.*, 263 Cal. Rptr. 869 (Cal. Ct. App. 1989) (interpreting child abuse and neglect statutes to cover amphetamine and opiate use during pregnancy); *In re Baby X*, 293 N.W.2d 736 (Mich. Ct. App. 1980) (finding that abuse and neglect statutes include heroin use while pregnant); *In re Stefanel Tyesha*, 556 N.Y.S.2d 280 (N.Y. App. Div. 1990) (interpreting statutes to

grappled with the subject of whether a woman has a maternal duty to guarantee the health of her fetus.³² As a result of these decisions, prenatal tort liability has now developed, primarily during the last few decades, to the point where children may now bring personal injury actions against their mothers for harmful prenatal conduct.³³ At the core of these personal injury actions is the belief that a child has a “legal right to begin life unimpaired by physical or mental defects caused by another’s negligence.”³⁴

Moreover, during the past thirty years, most courts have nullified the rule of “parental immunity,” which barred an unemancipated minor from bringing a tort action against his or her parent.³⁵ Those courts that were

include daily marijuana use while pregnant); *In re Fathima Ashanti K.J.*, 558 N.Y.S.2d 447 (N.Y. Fam. Ct. 1990) (interpreting statutes to include abuse to fetuses); *Dep’t of Soc. Servs. ex rel. Mark S. v. Felicia B.*, 543 N.Y.S.2d 637 (N.Y. Fam. Ct. 1989) (finding abuse and neglect statutes include cocaine use while pregnant); *In re Smith*, 492 N.Y.S.2d 331, 337 (N.Y. Fam. Ct. 1985) (including excessive drinking during pregnancy under child abuse and neglect statutes); *In re Ruiz*, 27 Ohio Misc. 2d 31 (1986) (interpreting abuse and neglect statutes to include heroin use while pregnant).

32. See *Grodin v. Grodin*, where the court considered a child’s claim that his mother’s negligent use of tetracycline while pregnant caused him to develop discolored teeth after birth. 301 N.W.2d 869 (Mich. Ct. App. 1980). The court reasoned that a child is entitled to compensation from anyone wrongfully interfering with his “right to begin life with a sound mind and body.” *Id.* at 870. The court ruled that a mother may be held liable for injury to her child born alive, resulting from her negligence during pregnancy, if the injurious conduct is not protected by parent-child tort immunity. *Id.* However, *Stallman v. Youngquist* involved injury to a child allegedly caused by its mother’s negligent operation of a car while pregnant. 531 N.E.2d 355 (Ill. 1988). The court held that a child born alive has no cause of action against its mother for prenatal injury she *unintentionally* inflicted upon it. *Id.* at 361 (emphasis added). The court found that such liability would involve excessive legal interference in the uniquely intimate relationship between a mother and her fetus at the expense of the mother’s privacy and autonomy rights. Courts might not be able to apply this kind of liability fairly among all pregnant women in their varying socioeconomic circumstances. *Id.* at 359-61.

33. Fleming, *supra* note 18, at 1086-87. See also *Bonte v. Bonte*, 616 A.2d 464 (N.H. 1992) (providing that child born alive has cause of action against his or her mother for mother’s negligent conduct that results in prenatal injuries); *Grodin*, 301 N.W.2d at 869 (finding that tetracycline ingested during pregnancy resulted in discolored teeth in child), *disagreed with on other grounds by Thelen v. Thelen*, 435 N.W.2d 495 (Mich. Ct. App. 1989).

34. Fleming, *supra* note 18, at 1085. The vast majority of courts have vacated the contrasting rule that was prevalent before 1946. *Id.* at 1086. Today most courts hold that a child born alive may recover damages for prenatal injuries tortiously inflicted upon it by a third person. *Id.* See also *ETHICAL ISSUES IN MATERNAL-FETAL MEDICINE* 131-46 (Donna L. Dickenson ed., Cambridge University Press 2002) (advocating restrictions on the freedoms of pregnant women).

Additionally, physicians are not immune from liability for tortious prenatal injury to a fetus. See *Renslow v. Mennonite Hosp.*, 367 N.E.2d 1250 (Ill. 1977) (discussing a right to be born free from prenatal injuries foreseeably caused by a breach of physician’s duty to child’s mother); *Ellig v. Delnor Cmty. Hosp.*, 603 N.E.2d 1203 (Ill. App. Ct. 1992) (finding obstetrician was sole proximate cause of undiagnosed twin’s injuries resulting in death); *Peters v. Vander Kooi* 494 N.W.2d 708, 712-13 (Iowa 1993) (finding physician who ordered Pitocin to stimulate progress of labor allegedly was negligent in not assuring availability of physician who could perform cesarian section in the event of fetal distress).

35. Fleming, *supra* note 18, at 1086. See also 59 AM. JUR. 2D *Parent and Child* § 148 (1987) (stating that “the modern inclination is to regard the minor’s damage action against parent . . . as

reluctant to tread down the path of parental immunity abrogation instead curtailed the immunity. Those courts either carved out exceptions for negligent automobile operation,³⁶ claims covered by insurance,³⁷ or limited immunity to injuries resulting from the “exercise of parental authority or discretion.”³⁸ Some commentators endorse the imposition of prenatal tort liability on women as a means of “promoting fetal health by discouraging maternal conduct detrimental thereto.”³⁹ However, other commentators⁴⁰

maintainable where the injury or death was intentional or resulted from willful misconduct or an evil mind, whether or not characterized as malice”).

36. See, e.g., *Cates v. Cates*, 619 N.E.2d 715 (Ill. 1993) (concluding that the negligent operation of an automobile was not conduct inherent to the parent-child relationship and the doctrine did not bar the child’s negligence action); *Nocktonick v. Nocktonick*, 611 P.2d 135 (Kan. 1980) (holding that unemancipated minor may recover damages in an action against a parent for injuries allegedly caused by the negligence of the parent in the operation of an insured motor vehicle); *Black v. Solmitz*, 409 A.2d 634 (Me. 1979) (holding that negligent automobile actions should not be dismissed on the ground of parental immunity); *France v. A.P.A. Trans. Corp.*, 267 A.2d 490 (N.J. 1970) (upholding the validity of abrogating immunity as to vehicle accidents); *Guess v. Gulf Ins. Co.*, 627 P.2d 869 (N.M. 1981) (holding that a negligent-automobile-operation suit may be maintained between a child and his or her representative and the parents or their personal representative); *Nuelle v. Wells*, 154 N.W.2d 364 (N.D. 1967) (permitting an unemancipated minor to have a claim against his parents in automobile negligence claim); *Unah v. Martin*, 676 P.2d 1366 (Okla. 1984) (qualifying the rule of parental immunity to allow an action for negligence arising from an automobile accident brought on behalf of an unemancipated minor child against a parent); *Winn v. Gilroy*, 681 P.2d 776 (Or. 1984) (maintaining a mother’s cause of action against her husband for the wrongful death of their children, which occurred in an automobile accident); *Silva v. Silva*, 446 A.2d 1013 (R.I. 1982) (allowing an automobile tort action between a parent and her unemancipated minor child); *Merrick v. Sutterlin*, 610 P.2d 891 (Wash. 1980) (concluding that child, as well as other children, who were injured by the negligence of a parent in an automobile accident had a cause of action against that parent); *Lee v. Corner*, 224 S.E.2d 721 (W. Va. 1976) (ruling that the parental immunity doctrine did not preclude personal injury actions by unemancipated minors against their parents for injuries sustained in motor vehicle accidents).

37. See, e.g., *Myers v. Robertson*, 891 P.2d 199 (Alaska 1995) (affirming that in a suit against the mother brought by a child, the insurance company is the real party in interest); *Ard v. Ard*, 414 So. 2d 1066 (Fla. 1982) (holding that parental immunity was waived where liability insurance was available to ease the financial difficulties that resulted when a parent caused injury to a child); *Farmers Ins. Group v. Reed*, 712 P.2d 550 (Idaho 1985) (concluding that damages in intrafamily actions were limited to the limits of the automobile liability insurance policy); *Transamerica Ins. Co. v. Royle*, 656 P.2d 820 (Mont. 1983) (sustaining plaintiff’s obligation to defend or provide coverage for defendant parents who were being sued by their minor daughter who was injured in an automobile accident while a passenger in her mother’s car); *Jilani v. Jilani*, 767 S.W.2d 671 (Tex. 1988) (holding that driving an automobile was not an exercise of parental authority or an exercise of discretion in providing for the care and necessities of a child and an automobile tort action brought by an unemancipated child against a parent was outside of the scope of the doctrine of parental immunity); *Smith v. Kauffman*, 183 S.E.2d 190 (Va. 1971) (finding that the rule of parental immunity was anachronistic based upon the high incidence of liability insurance coverage in the state).

38. Fleming, *supra* note 18, at 1086. See also RESTATEMENT (SECOND) OF TORTS § 895G(1) (1979) (clarifying that the “parent or child is not immune from tort liability to the other solely by reason of that relationship”).

39. Fleming, *supra* note 18, at 1086.

40. See, e.g., Dawn Johnsen, *Shared Interests: Promoting Healthy Births Without Sacrificing Women’s Liberty*, 43 HASTINGS L.J. 569 (1992) (stating that if not formulated with care, governmental policies adopted to promote healthy births can lead to significant and unnecessary intrusions on

condemn such measures as “impractical” and “unacceptable” encroachments on a pregnant woman’s right to privacy, autonomy, and bodily integrity in procreational matters, as acknowledged in *Roe v. Wade*⁴¹ and its progeny.⁴²

B. Born Alive Rule, Wrongful Death, and Viability

In general, when an injured fetus is born alive, the child or those acting on behalf of the child may maintain an action to recover damages for negligently inflicted prenatal injuries caused by third parties.⁴³ Furthermore, some courts hold that it is irrelevant whether the injuries occurred at the gestational stage or whether the fetus was viable at the time of the injuries.⁴⁴ For example, the administrator of the estate of a dead

women’s fundamental liberties); Christa J. Richer, Note, *Fetal Abuse Law: Punitive Approach and the Honorable Status of Motherhood*, 50 SYRACUSE L. REV. 1127 (2000) (prosecuting expectant mothers may promulgate a patriarchal society).

41. 410 U.S. 113 (1973).

42. Fleming, *supra* note 18, at 1086. See *Planned Parenthood v. Casey*, where the Court affirmed, inter alia, that a woman has the right to choose to have an abortion before her fetus is viable and to obtain an abortion without undue interference from a state. 505 U.S. 833 (1992). The Court stated that a state has the power to restrict abortions after fetal viability, if the state law imposing such a restriction contains exceptions for pregnancies which endanger a woman’s life or health. *Id.* In addition, the court motioned that a state has legitimate interests from the outset of a pregnancy in protecting the health of the pregnant woman and the life of the fetus that may become a child. *Id.* But see *Webster v. Reproductive Health Services*, where the Court concluded that the trimester framework established in *Roe* was unduly rigid and should be abandoned. 492 U.S. 490 (1989). The *Webster* Court however, stopped short of holding that a fetus is a “person” under the Fourteenth Amendment. LARSEN, *supra* note 22, at 31.

43. 62A AM. JUR. 2D *Prenatal Injuries; Wrongful Life, Birth or Conception* § 8 (2000).

44. 2 STEIN ON PERSONAL INJURY DAMAGES TREATISE § 12:13 (3d ed. 2002). See also *Simon v. Mullin*, 380 A.2d 1353, 1357 (Conn. Super. Ct. 1977) (allowing recovery by or on behalf of a child born alive for prenatal injuries suffered at any time after conception without regard to the viability of the fetus); *Day v. Nationwide Mut. Ins. Co.*, 328 So. 2d 560 (Fla. Dist. Ct. App. 1976) (maintaining negligence action by a minor for prenatal injuries suffered during the sixth week of gestation); *Hornbuckle v. Plantation Pipe Line Co.*, 93 S.E.2d 727 (Ga. 1956) (holding child born after receiving tortious injury at any period after conception had cause of action for prenatal injuries regardless of whether they were sustained while he was an embryo or fetus); *Renslow*, 367 N.E.2d at 1250 (discussing a right to be born free from prenatal injuries foreseeably caused by a breach of physician’s duty to child’s mother); *Daley v. Meier*, 178 N.E.2d 691 (Ill. App. Ct. 1961) (finding infant who was born alive and survived could maintain action to recover for prenatal injuries resulting from negligence of another even though infant had not reached state of viability at time of injury); *Bennett v. Hymers*, 147 A.2d 108 (N.H. 1958) (holding that infant born alive may maintain an action to recover prenatal injuries inflicted upon it by the tort of another even though fetus was not viable at time of injury); *Smith v. Brennan*, 157 A.2d 497 (N.J. 1960) (finding no reason for denying recovery for a prenatal injury that occurred before the infant was capable of a separate existence); *Kelly v. Gregory*, 125 N.Y.S.2d 696 (N.Y. App. Div. 1953) (holding legal entity of child begins at conception and that a child, born alive, may recover for prenatal injury tortiously inflicted at any time after conception, regardless of fetal viability at time of injury); *Sylvia v. Gobeille*, 220 A.2d 222 (R.I. 1966) (holding child born alive has a right of action in tort against a negligent wrongdoer for prenatal injuries).

infant who was “born alive” may generally bring a state claim for wrongful death against its mother’s tortfeasor.⁴⁵ In the legal realm, allowing recovery for prenatal injury to a fetus later born alive has become the “universal” rule.⁴⁶ For instance, during the last fifty years, virtually all jurisdictions have recognized tort actions against third parties for the infliction of prenatal injuries when the child is subsequently born alive.⁴⁷

45. See *infra* notes 49-56 and accompanying text.

46. RESTATEMENT (SECOND) OF TORTS § 869(1) cmt. a. (1979). “The earlier decisions on prenatal injuries . . . denied all recovery.” *Id.* The rationale was that because the person was not yet in existence there could be no duty owed and the causal connection would be too great a problem thereby posing the danger of unfounded claims. *Id.* However, legal commentators attacked these decisions, arguing that the unborn child is a legal entity in other areas of the law. *Id.* In those other areas of the law such as property law and criminal law, there were no difficulties of proof. *Id.* Furthermore, there were no more frequent and no greater challenges of proof than in cases of many other medical problems. *Id.*

47. See, e.g., *Wolfe v. Isbell*, 280 So. 2d 758 (Ala. 1973) (upholding action maintained for wrongful death arising from injury to an unborn child, whether or not the fetal child was viable when the injury was inflicted, if the child is subsequently born alive and dies from the injury); *Scott v. McPheeters*, 92 P.2d 678 (Cal. Dist. Ct. App. 1939) (stating that child could maintain malpractice suit against physician for injuries sustained by the child before its birth by the alleged “negligent use of metal clamps and forceps incident to the delivery of the child”); *Prates v. Sears, Roebuck & Co.*, 118 A.2d 633 (Conn. Super. Ct. 1955) (finding that decedent who sustained injuries *en ventre sa mere*, would have had right of action for such injuries if she had lived); *Worgan v. Greggo & Ferrara, Inc.*, 128 A.2d 557 (Del. Super. Ct. 1956) (holding that administrator of viable infant killed by negligence had right of action against wrongdoer); *Bonbrest v. Kotz*, 65 F. Supp. 138 (D.C. 1946) (holding that child injured in process of removal from its mother’s womb by defendants’ alleged professional malpractice was a viable child and had standing in court to maintain action for its injury, and could not be denied recovery on ground that it was merely a part of its mother); *Day*, 328 So.2d at 560 (“[A] child born alive, having suffered prenatal injuries at any time after conception, had a cause of action against the alleged tortfeasor.”); *Tucker v. Howard L. Carmichael & Sons, Inc.*, 65 S.E.2d 909 (Ga. 1951) (stating that infant could maintain an action for prenatal injuries allegedly caused by defendant’s negligent operation of ambulance); *Rodriguez v. Patti*, 114 N.E.2d 721 (Ill. 1953) (finding that while infant was an infant *en ventre sa mere*, through his mother and next friend, had cause of action for injuries); *Wendt v. Lillo*, 182 F. Supp. 56 (N.D. Iowa 1960) (maintaining action for death of unborn child from injuries received in automobile collision); *Hale v. Manion*, 368 P.2d 1 (Kan. 1962) (allowing parents to maintain action for wrongful death of viable unborn child resulting from negligent acts of taxicab company); *Orange v. State Farm Mut. Auto. Ins. Co.*, 443 S.W.2d 650, 651 (Ky. 1969) (ruling that a viable unborn child of insured was a legal “person” with a separate existence of its own and was member of class excluded from coverage by “family” or “household” exclusion clause of automobile liability policy); *Cooper v. Blanck*, 39 So. 2d 352 (La. Ct. App. 1923) (holding that a viable fetus capable of sustaining independent existence, including a fetus *en ventre sa mere* in ninth month of gestation, is a “child” for whose negligent killing an action may be maintained); *Damasiewicz v. Gorsuch*, 79 A.2d 550 (Md. 1951) (allowing child injured in automobile accident while *en ventre sa mere* that was prematurely born permanently blind in both eyes because of the accident to recover from drivers of automobiles for such injuries in the event that the drivers were negligent); *Keyes v. Constr. Serv. Inc.*, 165 N.E.2d 912 (Mass. 1960) (finding that where a child in utero is so far advanced in prenatal age as that child could live separable from the mother, child has a right of action for any injuries wantonly or negligently inflicted upon his or her person at such age of viability); *Womack v. Buckhorn*, 187 N.W.2d 218 (Mich. 1971) (holding common-law negligence action could be brought on behalf of an eight-year-old surviving child for prenatal brain injuries suffered during the fourth month of the pregnancy in an automobile accident); *Verkennes v. Cornica*,

The Connecticut Superior Court in *Simon v. Mullin*⁴⁸ supports the “well-established trend”⁴⁹ that allows recovery on behalf of a child born alive for prenatal injuries inflicted at “any time of the pregnancy.”⁵⁰ In *Simon*, a car accident caused the injury to the four-month old fetus.⁵¹ For two months after the accident, the mother experienced intermittent vaginal bleeding and ultimately suffered from a rupture of her membranes, which resulted in the baby’s premature birth.⁵² In a case of first impression, the

38 N.W.2d 838 (Minn. 1949) (stating that representative of viable unborn child capable of separate and independent existence, whose death was allegedly caused by wrongful acts or omission of physician in charge of mother and of hospital in which she was confined, could maintain action); *Rainey v. Horn*, 72 So. 2d 434 (Miss. 1954) (allowing recovery for viable unborn child that died before birth as the result of the negligent act of another); *Steggall v. Morris*, 258 S.W.2d 577 (Mo. 1953) (holding that viable child who sustained prenatal injuries from which he died a few days after birth, was a person within meaning of wrongful death statute under which person responsible for such injuries would be liable to parents in damages for death of child); *White v. Yup*, 458 P.2d 617 (Nev. 1969) (maintaining cause of action for wrongful death of the unborn eight-month-old fetus which had been viable at time of injury but was stillborn as a result of the injury); *Bennett v. Hymers*, 147 A.2d 108 (N.H. 1958) (ruling that infant born alive can maintain an action to recover prenatal injuries inflicted upon it by the tort of another even if the infant had not become a viable fetus at time of injury); *Smith v. Brennan*, 157 A.2d 497 (N.J. 1960) (permitting recovery for injuries sustained by the infant plaintiff while in the womb of his mother when injured in an automobile collision caused by the defendant’s negligence); *Woods v. Lancet*, 102 N.E.2d 691 (N.Y. 1951) (stating that child tortiously injured during the ninth month of his mother’s pregnancy, while existing as a viable fetus, and later born, is entitled to recover for such injury); *Williams v. Marion Rapid Transit Co.*, 87 N.E.2d 334 (Ohio 1949) (finding that injuries wrongfully inflicted upon a viable unborn child that was capable of existing independently of the mother subsequent to his birth, presented a cause of action); *Mallison v. Pomeroy*, 291 P.2d 225 (Or. 1955) (holding that plaintiff, who suffered injuries while in womb of mother during her sixth month of pregnancy at time of accident, had cause of action for the prenatal injuries against motorist whose automobile allegedly negligently crashed into rear of automobile in which mother was seated); *Sinkler v. Kneale*, 164 A.2d 93 (Pa. 1960) (finding that child, who was born Mongoloid as result of injuries received in an automobile collision when the child was a one month old fetus had a right to recover); *Sylvia v. Gobeille*, 220 A.2d at 222 (holding that a child born alive has a right of action in tort against a negligent wrongdoer for prenatal injuries); *Hall v. Murphy*, 113 S.E.2d 790 (S.C. 1960) (stating that a fetus having reached that period of prenatal maturity where it is capable of independent life apart from its mother is a person and if such a child is injured, it may maintain an action for injuries after birth); *Shousha v. Matthews Drivurself Serv., Inc.*, 358 S.W.2d 471 (Tenn. 1962) (holding where infants were viable, parents could prosecute suits for injuries and death); *Leal v. C.C. Pitts Sand & Gravel, Inc.*, 419 S.W.2d 820 (Tex. 1967) (stating that where child was born alive but died two days later as result of prenatal injuries suffered when the mother was involved in an automobile-truck collision, parents had cause of action for wrongful death of child against truck operator); *Seattle First Nat. Bank v. Rankin*, 367 P.2d 835 (Wash. 1962) (maintaining cause of action in favor of child against defendant physician for negligence in the care of plaintiff’s mother during pregnancy and in delivery of child born with cerebral palsy); *Kwaterski v. State Farm Mut. Auto Ins. Co.*, 148 N.W.2d 107, 112 (Wis. 1967) (finding “viable infant who receives injury and is stillborn is ‘person’ within meaning of (wrongful death statute) so as to give rise to wrongful death action by parents of stillborn infant”).

48. *Simon*, 380 A.2d at 1353.

49. 62A AM. JUR. 2D *Prenatal Injuries; Wrongful Life, Birth or Conception* § 18 (2000).

50. *Simon*, 380 A.2d at 1356.

51. *Id.* at 1354.

52. *Id.*

court analyzed the issue of whether the administrator of a child's estate may recover for prenatal injury to a nonviable fetus.⁵³ Answering in the affirmative, the court held that the administrator could recover for prenatal injuries sustained at any time after conception, "irrespective of viability."⁵⁴ The rule therefore, is that if the child is born alive, and if the plaintiff can satisfactorily establish the tortious conduct and legal cause of the harm, he or she may recover for any prenatal injury occurring "any time after conception."⁵⁵ However, despite this well-established recognition that a child born alive may bring a tort claim for prenatal injuries negligently caused by third parties, only a minority of courts have extended civil liability to the *mother* of the child born alive.⁵⁶

As previously mentioned, in those cases brought by or on behalf of a child for prenatal injuries, there exists an implied condition that the injured unborn child be born alive before liability attaches.⁵⁷ However, if the unborn child dies and was *viable* at the time of the tortious prenatal injuries, a majority of states allow recovery under the applicable wrongful death statute.⁵⁸ Although all fifty states have wrongful death statutes,⁵⁹ the question of whether to permit recovery for the wrongful death of a viable

53. *Id.*

54. *Id.* at 1357.

55. RESTATEMENT (SECOND) OF TORTS § 869 cmt. d. Furthermore, "[t]he rule stated . . . is not limited to unborn children who are 'viable' at the time of the original injury, that is, capable of independent life, if only in an incubator." *Id.*

56. *See, e.g.,* National Cas. Co. v. Northern Trust Bank of Fla., N.A., 807 So. 2d 86 (Fla. Dist. Ct. App. 2001) (holding that a mother may be held liable for prenatal negligence that led to an automobile accident, causing injury to the fetus); *Bonte*, 616 A.2d at 464 (holding that child born alive has cause of action against his or her mother for mother's negligent conduct that results in prenatal injuries). The *Bonte* court reasoned that because a "child born alive may maintain a cause of action against another for injuries sustained while in utero, and a child may sue his or her mother in tort for the mother's negligence, it follows that a child born alive has a cause of action against his or her mother for the mother's negligence that caused injury to the child when in utero." *Id.* at 466. *See also Grodin*, 301 N.W.2d at 869 (ruling that tetracycline ingested during pregnancy resulted in discolored teeth in child for which the mother was civilly liable).

57. 62A AM JUR. 2D. *Prenatal Injuries; Wrongful Life, Birth or Conception* § 8 (2000). *See also supra* notes 43-47 and accompanying text.

58. 19 AM. JUR. POF 3D 107 *Wrongful Death of Fetus* § 1 (1993) (emphasis added). Under the common law, no cause of action existed for the wrongful death of any individual and as a result, it was cheaper for the defendant to kill the plaintiff than to injure him. 19 AM. JUR. POF 3D 107 § 4. Hoping to rectify this iniquity, state legislatures enacted wrongful death statutes with the purpose of providing a cause action against those whose tortious conduct destroys human life while compensating those who were injured as a result of the wrongful death of another and protecting human life. The deterrence of dangerous conduct another purpose. *Id.* This rationale makes sense from a biological and legal standpoint, because a viable unborn child is not merely a part of its mother. Sheldon R. Shapiro, Annotation, *Right to Maintain Action or to Recover Damages for Death of Unborn Child*, 84 A.L.R.3d 411 § 2(a) (2001).

59. 19 AM. JUR. POF 3D, *supra* note 58, § 4 (citing PROSSER & KEETON, ON THE LAW OF TORTS § 127 (5th ed. 1984)).

but unborn child depends on statutory interpretation.⁶⁰ Most courts have held that “a viable unborn child is a ‘person’ or ‘individual’” according to their wrongful death statutes.⁶¹ Conversely, a large minority of state courts deny recovery on the ground that the legislature did not intend the wrongful death statute to apply to these kinds of cases.⁶² These courts have relied on reasoning such as: an unborn child is not a distinct legal personality; compensation for injuries to the mother is adequate; the right to maintain a wrongful death action should depend on the child being born alive; and proof of causation and damages are too difficult to determine when a child dies before being born.⁶³

However, in the absence of statutory authority, some jurisdictions have permitted the parents to recover based upon the wrongful infliction of emotional distress even though the legislature may have technically

60. *Id.* See also RESTATEMENT (SECOND) OF TORTS § 869(2) (stating “[I]f the child is not born alive, there is no liability unless the applicable wrongful death statute so provides.”).

61. 19 AM. JUR. POF 3D 107 § 4. The holding in *Webster v. Reproductive Health Services* supports the viewpoint that a viable unborn child is a “person” or “individual” within the meaning of the wrongful death statutes. *Id.* (citing *Webster v. Reprod. Health Servs.*, 492 U.S. at 490). The Court recognized that the states’ compelling interest in protecting the lives of viable unborn children is “expanding in favor of added protections.” *Id.* at 561. The *Webster* Court went on to say that if the state’s interest in protecting the health of an unborn child is compelling at the point of viability, then it is equally compelling before viability, and, in fact, throughout gestation. *Id.* The plurality noted that it did not understand why the state’s interest in protecting potential human life should come into existence “only at the point of viability.” *Id.* Therefore, the Court noted, it is unclear why there is a “rigid line allowing state regulation after viability but prohibiting it before viability.” *Id.*

62. See, e.g., *Mace v. Jung*, 210 F. Supp. 706 (D. Alaska 1962) (barring recovery under Alaska wrongful death statute for death of nonviable unborn child as result of automobile collision); *Kilmer v. Hicks*, 529 P.2d 706 (Ariz. Ct. App. 1974) (finding “person” within purview of statute providing for recovery of damages when “death of a person is caused by wrongful act,” is clear and unambiguous in its noninclusion of viable fetus); *Justus v. Atchison*, 565 P.2d 122 (Cal. 1977) (holding wrongful death action could not be maintained for death of stillborn fetus, in view of fact that a fetus is not a “person” within meaning of wrongful death statute); *Stern v. Miller*, 348 So. 2d 303 (Fla. 1977) (stating that fetus, which was alleged to have been viable and to have been fatally injured by defendant’s negligence, was not a “person” for purposes of wrongful death statute); *Toth v. Goree*, 237 N.W.2d 297 (Mich. Ct. App. 1975) (concluding that nonviable three month old infant, not born alive, was not “person” within meaning of wrongful death statute); *Drabbels v. Skelly Oil Co.*, 50 N.W.2d 229 (Neb. 1951) (stating that deceased could not have maintained an action at common law for injuries received by it while in its mother’s womb, because it was born dead); *Graf v. Taggart*, 204 A.2d 140 (N.J. 1964) (finding there can be no right of recovery for wrongful death of unborn child); *In re Logan’s Estate*, 144 N.E.2d 644 (N.Y. 1957) (holding action for wrongful death with respect to estate of stillborn child after mother was injured in automobile accident occurring during her pregnancy was not covered under wrongful death statute); *Marko v. Philadelphia Transp. Co.*, 216 A.2d 502 (Pa. 1966) (barring recovery by administrator of estate on behalf of viable fetus that was stillborn under wrongful death statute); *Hogan v. McDaniel*, 319 S.W.2d 221 (Tenn. 1958) (finding an unborn viable child developed during nine months of pregnancy, alive and capable of existence separate and apart from its mother, was not a “person” within contemplation of wrongful death statutes); *Lawrence v. Craven Tire Co.*, 169 S.E.2d 440 (Va. 1969) (barring right of action under wrongful death statutes for death of unborn viable child).

63. Shapiro, *supra* note 58, § 2(a).

rejected recovery for the wrongful death of a fetus.⁶⁴ A slightly larger number of courts have construed their statutes to permit recovery for wrongful death even if the child is stillborn.⁶⁵ In fact, a few states have allowed recovery for tortious conduct that occurred before the child's conception.⁶⁶

C. From Feticide⁶⁷ to Fetal Abuse: The Unborn Child in Criminal Law

Whether courts may convict the slayer of a fetus under homicide statutes has been the subject of controversy for many years.⁶⁸ At common law and in the absence of a statute, there is no crime if a child dies before birth.⁶⁹ However, under many state statutes today, if the child is born alive and later dies, the culpability is the same as that incurred in the killing of any other human being.⁷⁰ The rationale being that a child who has an "independent existence" separate from his or her mother is a human being.⁷¹ The common law further distinguishes fetal life before and after the period of "quickening," which generally occurs between the sixth and eighth week of pregnancy.⁷²

64. See, e.g., *Parvin v. Dean*, 7 S.W.3d 264 (Tex. Ct. App. 1999) (finding that there is no compelling state interest in a gender-based denial of a father's right to recover damages for his own mental anguish from the negligently caused loss of his viable fetus).

65. See, e.g., *Verkennes v. Cornica*, 38 N.W.2d 838 (Minn. 1949) (allowing recovery when the child died during birth); *Rainey v. Horn*, 72 So. 2d 434 (Miss. 1954) (allowing recovery when forced birth resulted in death of child).

66. See, e.g., *Bergstreser v. Mitchell*, 577 F.2d 22 (8th Cir. 1978) (allowing recovery for injury caused by negligent performance of caesarian on mother for earlier child); *Renslow*, 367 N.E.2d at 1250 (holding as negligent the transfusion of RH-negative blood into woman with RH-positive blood, years before conception); *Monusko v. Postle*, 437 N.W.2d 367 (Mich. Ct. App. 1989) (allowing recovery for child after doctors negligently failed to immunize mother for rubella before she conceived).

67. Feticide is defined as the "act or an instance of killing a fetus, usually by assaulting and battering the mother; an intentionally induced miscarriage." BLACK'S LAW DICTIONARY 636 (7th ed. 1999).

68. *Wasserstrom*, *supra* note 17, at 671.

69. *Id.*

70. *Id.*

71. *Id.* See also 40 AM. JUR. 2D, *Homicide* § 9 (1999) (finding existence to occur only seconds after birth).

72. *Wasserstrom*, *supra* note 17, at 686 (citing *Abrams v. Foshee*, 3 Clarke 274 (1856), which stated "that there was no crime of abortion at common law"). At common law, causing the death of an unborn child after quickening was legally regarded as "a great misprision," that is, a misdemeanor, and not homicide, and that causing a miscarriage before quickening was not a punishable offense. *Id.* One reason for this distinction was that it was too difficult to determine the cause of death of the infant. *Id.* Whether the child was capable of maintaining its existence apart from the mother's body "was thought to be impossible to know" until that fact was actually demonstrated by the independent functioning of its own circulatory and respiratory systems. *Id.* Therefore the common law courts said "in the contemplation of the law that a child who had not yet breathed with its own lungs, though born alive,

The issue of whether a person is “born alive” most often arises in determining whether prosecutors may bring homicide or manslaughter charges for fetal damage inflicted in utero.⁷³ Although under the common law a conviction was possible only if the child was born alive, this is no longer the prevalent rule under state statutes.⁷⁴ Previously, if the harmed fetus did not survive to birth, most state courts found that common law homicide statutes did not apply.⁷⁵ Recently however, courts have provided that damage inflicted on a fetus in utero is sufficient to support a homicide charge even without a live birth.⁷⁶

At the federal level, feticide statutes are receiving growing attention.⁷⁷ Under the Unborn Victims of Violence Act,⁷⁸ United States Attorneys can

must still be dependent upon its mother for life, and, in this sense, its condition was still exactly like that of the fetus in utero.” *Id.*

73. During the past thirty years, courts have consistently concluded that the death of an infant who is born alive from injuries inflicted in utero constitutes homicide. *See, e.g., Spencer*, 839 F.2d at 1341 (kicking and stabbing of mother resulting in death of infant ten minutes after birth was killing of “human being”); *State v. Courchesne*, 757 A.2d 699 (Conn. Super. Ct. 1999) (finding that a baby who had been born alive but who later died from injuries inflicted in utero when pregnant mother was stabbed was a “person” under murder statute); *Ranger v. Georgia*, 290 S.E.2d 63 (Ga. 1982) (holding that death of child, twelve hours after birth, caused by shooting of mother has sufficient to sustain conviction for felony murder of child); *Illinois v. Bolar*, 440 N.E.2d 639 (Ill. App. Ct. 1982) (finding that newborn surviving only long enough to exhibit a few heartbeats was an “individual” within meaning of manslaughter and reckless homicide statutes); *Jones v. Kentucky*, 830 S.W.2d 877 (Ky. 1992) (holding that infant who died from prenatal injuries fourteen hours after birth was “person” within criminal homicide statutes); *Williams v. Maryland*, 561 A.2d 216 (Md. 1989) (stating that death of child seventeen hours after birth from arrow wound inflicted upon mother supported manslaughter conviction); *New Jersey v. Anderson*, 343 A.2d 505 (N.J. Super. Ct. Law Div. 1975), *rev’d on other grounds*, 413 A.2d 611 (N.J. Super. Ct. App. Div. 1980) (holding twins who died were within hours of birth persons within meaning of homicide laws); *New York v. Hall*, 158 A.2d 69 (N.Y. App. Div. 1990) (holding infant who died forty-three hours after birth from injuries suffered by mother in car crash “individual” within the meaning of manslaughter statute).

74. For further discussion of the demise of the born alive rule, see Mary Lynn Kime, *Hughes v. State: The “Born Alive” Rule Dies a Timely Death*, 30 TULSA L.J. 539, 553-54 (1994), and Stephanie McCavitt, *The “Born Alive” Rule: A Proposed Change to the New York Law Based on Modern Medical Technology*, 36 N.Y.L. SCH. L. REV. 609, 611 (1991).

75. *See supra* note 72 and accompanying text.

76. *See infra* note 80 and accompanying text. *See also Hughes v. State*, 868 P.2d 730 (Okla. Crim. App. 1994) (stating that the killing of an “unborn quick child” is manslaughter and the statute defines “quick child” to mean a viable child).

77. StateWatch, *Los Angeles Times Looks At Growing Debate Over Fetal Rights Laws in States* (May 29, 2001), at http://www.kaisernetwork.org/daily_reports/rep_index.cfm?DR_ID=4819 (last visited Jan. 9, 2003).

78. Unborn Victims of Violence Act of 2001, H.R. 503, 107th Cong. § 1841 (2001) [hereinafter UVVA]. On April 26th, 2001 the House of Representatives passed the UVVA by a vote of 252-172. *Uphold the Right to Choose*, Editorial (May 2, 2001) at <http://www.hillnews.com/050201/editorial.shtml> (last visited Jan. 9, 2003). The majority of states already have laws similar to the UVVA and none has fallen to any constitutional challenge. *See infra* notes 82-84 and accompanying text. The UVVA does not distinguish crimes committed before viability and provides that “the term ‘unborn child’ means a child in utero, and the term ‘child in utero’ . . . means a member of the species

charge individuals who commit an already defined federal crime of violence against a pregnant woman with a second offense on behalf of the second victim, the unborn child.⁷⁹ Currently, the majority of states already have “unborn victim laws.”⁸⁰ Additionally, some states promulgate homicide laws that recognize unborn children as victims, but only during part of the prenatal development.⁸¹ Furthermore, those states without

homo sapiens, at any stage of development, who is carried in the womb.” H.R. 503 § 1841(d) (emphasis added).

79. H.R. 503 § 1841.

80. See, e.g., ARIZ. REV. STAT. § 13-1103(A)(5) (West 1989 & Supp. 1998) (stating that the killing of an “unborn child” at any stage of prenatal development is manslaughter); ILL. COMP. STAT. CH. 720 §§ 5/9-1.2, 5/9-2.1, 5/9-3.2 (2000) (defining the killing of an “unborn child” at any stage of prenatal development is intentional homicide, voluntary manslaughter, or involuntary manslaughter or reckless homicide); LA. REV. STAT. ANN. §§ 14:32.5-14.32.8, read with §§ 14:2(1), (7), (11) (West 1997) (stating that the killing of an “unborn child” is first degree feticide, second degree feticide, or third degree feticide); MINN. STAT. ANN. §§ 609.266, 609.2661-609.2665, 609.268(1) (West 1987) (stating that the killing of an “unborn child” at any stage of prenatal development is murder (first, second, or third degree) or manslaughter (first or second degree). It is also a felony to cause the death of an “unborn child” during the commission of a felony and the death of an “unborn child” “through operation of a motor vehicle is criminal vehicular operation. *Id.* at § 609.21 (West Supp. 2002); MO. ANN. STAT. §§ 1.205, 565.024, 565.020 (West Supp. 2002) (defining the killing of an “unborn child” at any stage of prenatal development as involuntary manslaughter or first degree murder); N.D. CENT. CODE §§ 12.1-17.1-01-12.1-17.1-04 (1997) (stating that the killing of an “unborn child” at any stage of prenatal development is murder, felony murder, manslaughter, or negligent homicide); OHIO REV. CODE ANN. §§ 2903.01-2903.07, 2903.09 (Anderson 1997 & Supp. 2002) (stating that at any stage of prenatal development, if an “unborn member of the species *homo sapiens*, who is or was carried in the womb of another” is killed, it is aggravated murder, murder, voluntary manslaughter, involuntary manslaughter, negligent homicide, aggravated vehicular homicide, and vehicular homicide); 18 PA. CONS. STAT. ANN. §§ 2601-09 (1998) (establishing that the killing of an “unborn child” at any stage of prenatal development is first, second, or third-degree murder, or voluntary manslaughter); S.D. CODIFIED LAWS § 22-16-1, 22-16-1.1, 22-16-15(5), 22-16-20, and 22-16-41, read with §§ 22-1-2(31), 22-1-2(50A) (Supp. 1998) (stating that the killing of an “unborn child” at any stage of prenatal development is fetal homicide, manslaughter, or vehicular homicide); UTAH CODE ANN. § 76-5-201 *et seq.* (1999 § Supp. 2002) (requiring the killing of an “unborn child” at any stage of prenatal development to be treated as any other homicide); WIS. STAT. ANN. §§ 939.75, 940.01, 940.02, 940.05, 940.06, 940.08, 940.09, 940.10 (1998) (establishing that the killing of an “unborn child” at any stage of prenatal development is first-degree intentional homicide, first-degree reckless homicide, second-degree intentional homicide, second-degree reckless homicide, homicide by negligent handling of dangerous weapon, explosives or fire, homicide by intoxicated use of vehicle or firearm, or homicide by negligent operation of vehicle).

81. See 1999 AR H.B. 1329 (West 1999) (stating that the killing of an “unborn child” of twelve weeks or greater gestation is murder, manslaughter, or negligent homicide); CAL. PENAL CODE § 187(a) (West 2000) (establishing that the killing of an unborn child after the embryonic stage is murder); FLA. STAT. ANN. § 782.071 (West 1999) (illustrating that the killing of an unborn child after viability is vehicular homicide), FLA. STAT. ANN. § 782.09 (West 2000) (defining the willful killing of an “unborn quick child” as manslaughter); GA. CODE ANN. § 16-5-80 (1999); § 40-6-393.1 (2001); and § 52-7-12.3 (1997) (stating that the killing of an “unborn child” after quickening is feticide, vehicular feticide, or feticide by vessel); Commonwealth v. Cass, 467 N.E.2d 1324 (Mass. 1984) (noting that the killing of an unborn child after viability is vehicular homicide); Commonwealth v. Lawrence, 536 N.E.2d 571 (Mass. 1989) (establishing that the killing of an unborn child after viability is involuntary manslaughter); MICH. COMP. LAW ANN. § 28.554 (West 1990) (defining the killing of

unborn victims laws criminalize particular conduct that terminates a human pregnancy or causes a miscarriage.⁸² A number of cases have challenged the constitutional validity of feticide statutes on the grounds of vagueness⁸³ and violations of equal protection.⁸⁴ However, all such

an “unborn quick child” as manslaughter). The Supreme Court of Michigan has interpreted this statute to apply to only those unborn children who are viable. *Larkin v. Cahalan*, 208 N.W.2d 176 (Mich. 1973); (A separate Michigan law, effective Jan. 1, 1999, provides felony penalties for actions that intentionally, or in wanton or willful disregard for consequences, cause a “miscarriage or stillbirth,” or cause physical injury to an “embryo or fetus.”); MISS. CODE ANN. § 97-3-37 (2000) (defining the willful killing of an “unborn quick child” as manslaughter); NEV. REV. STAT. AM § 200.210 (1997) (defining the killing of an “unborn quick child” as manslaughter); OKLA. STAT. ANN. tit. 21, § 713 (West 1983) (defining the willful killing of an “unborn quick child” as manslaughter); The killing of an unborn child after viability is homicide. *See Hughes*, 868 P.2d at 730; R.I. GEN. LAWS § 11-23-5 (1994) (stating that the willful killing of an “unborn quick child” is manslaughter and the statute defines “quick child” to mean a viable child); The killing of an unborn child after viability is homicide. *See State v. Horne*, 319 S.E.2d 703 (S.C. 1984); *State v. Ard*, 505 S.E.2d 328 (S.C. 1998); TENN. CODE ANN. § 39-13-201, 39-13-202, 39-13-210, 39-13-211, 39-13-213, 39-13-214, 39-13-215 (1997 & Supp. 2001) (defining the killing of an unborn child after viability as first-degree murder, second-degree murder, voluntary manslaughter, vehicular homicide, and reckless homicide); WASH. REV. CODE ANN. § 9A.32.060(1)(b) (West Supp. 2000) (defining the killing of an “unborn quick child” as manslaughter).

82. *See* IND. CODE ANN. § 35-42-1-6 (Michie 1994 & Supp. 1998) (stating that an individual who knowingly or intentionally “terminates a human pregnancy” commits feticide); IOWA CODE ANN. § 707.8 (West Supp. 2002) (stating that an individual who intentionally “terminates a human pregnancy” without the consent of the pregnant woman commits a felony and also establishing other crimes involving the termination of a human pregnancy, such as during the commission of a forcible felony); KAN. STAT. ANN. § 21-3440 (1995) (establishing that injury to a pregnant woman during the commission of a felony or misdemeanor which causes a miscarriage results in specific levels of offense severity). Also, injury to a pregnant woman through the operation of a motor vehicle which causes a miscarriage results in specific levels of offense severity. *Id.* at § 21-3441; N.H. REV. STAT. ANN. §§ 631:1-631:2 (1996) (stating that it is a felony to cause injury to another person that results in a miscarriage or stillbirth); N.M. STAT. ANN. § 30-3-7 (Michie 2002) (stating that it is a felony to injure a pregnant woman during the commission of a felony and cause her to suffer a miscarriage or stillbirth). It is also a crime to injure a pregnant woman through the unlawful operation of a vehicle which causes her to undergo a miscarriage or stillbirth. *Id.* at §§ 66-8-101.1 (Michie 2001); N.C. GEN. STAT. § 14-18.2 (2001) (stating that it is a felony to injure a pregnant woman during the commission of a felony and cause her to suffer a miscarriage or stillbirth. It is a misdemeanor to cause a miscarriage or stillbirth during a misdemeanor act of domestic violence); Va. CODE ANN. § 18.2-31 (11) (Michie Supp. 2002) (stating that the premeditated killing of a pregnant woman with the intent to cause the termination of her pregnancy is capital murder). The unpremeditated killing of a pregnant woman with the intent to cause the termination of her pregnancy is also a crime. *Id.* at § 18.2-32.1. It is a felony to injure a pregnant woman with the intent to maim or kill her or to terminate her pregnancy when she is injured or her pregnancy is terminated. *Id.* at § 18.2-51.2; N.Y. PENAL LAW § 125.00 (McKinney 1998) (stating that under New York statutory law, the killing of an “unborn child” after twenty-four weeks of pregnancy is homicide). However, under a separate statutory provision, a “person” that is the victim of a homicide is statutorily defined as “a human being who has been born and is alive.” *Id.* at § 125.05. *See also* *People v. Joseph*, 496 N.Y.S.2d 328 (N.Y. County Ct. 1985); *Gloria C. v. William C.*, 476 N.Y.S.2d 991 (N.Y. Fam. Ct. 1984); *People v. Vercelletto*, 514 N.Y.S.2d 177 (N.Y. County Ct. 1987).

83. *See, e.g., Smith v. Newsome*, 815 F.2d 1386 (11th Cir. 1987) (concluding that the Georgia feticide statute was not unconstitutionally vague); *People v. Henderson*, 275 Cal. Rptr. 837 (Cal. Ct. App. 1990) (upholding feticide statute against attack claiming it was for vagueness); *Brinkley v. State*,

challenges have failed.⁸⁵ Moreover, several courts rejected the claim that a feticide statute applied to consensual abortion.⁸⁶

In *Roe v. Wade*,⁸⁷ the Supreme Court held that a Texas criminal abortion statute prohibiting abortions at any stage of pregnancy except to save the life of the mother was unconstitutional.⁸⁸ The Court opined that “prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman’s attending physician.”⁸⁹ Furthermore, as the fetus approaches viability, the state may regulate abortion procedures in ways “reasonably related to maternal health,” and at the stage subsequent to viability, the state may “regulate, and even proscribe, abortion except where necessary in appropriate medical judgment for the preservation of the life or health of the mother.”⁹⁰

After the Court decided *Roe*, lower courts were left to interpret its holding and most adopted the view that the state could regulate abortion in the second trimester, but that it would be “absurd to construe a homicide statute as a tool to accomplish abortion regulation.”⁹¹ In addition, the Court determined that the “compelling” point, where a state’s important and legitimate interest in potential life arose, was at viability.⁹² According to the Court, a viable fetus presumably has the capability of meaningful life outside the mother’s womb and therefore, state protection of fetal life after viability has both “logical and biological justifications.”⁹³ If the state

322 S.E.2d 49 (Ga. 1984) (finding that a description of the unborn as the unborn child in the feticide statute is not unconstitutionally vague); *State v. Merrill*, 450 N.W.2d 318 (Minn. 1990) (holding that unborn child homicide statute was unconstitutionally vague after man killed woman and her one-month old fetus).

84. *Newsome*, 815 F.2d at 1388; *People v. Ford*, 581 N.E.2d 1189 (Ill. App. Ct. 1991) (holding that the fetal homicide statute did not violate the equal protection clause as it neither affected a fundamental right nor discriminated against a suspect class and the imposition of criminal penalties bore a rational relation to the protection of the potentiality of life).

85. *Wasserstrom*, *supra* note 17, at 688. However, in line with the decision in *Roe v. Wade*, some feticide statutes require that the child was viable. *Id.* In many state cases, courts have held that “state manslaughter by abortion statutes construed as imposing a penalty only for the abortion of a viable fetus were constitutional” and that “the application of a penalty under an abortion statute without distinguishing based on viability rendered the statutory provision invalid.” *Id.* In a number of cases, courts determined that criminal abortion statutes did not apply to the homicide of an unborn child. *Id.*

86. *Id.* See also *State v. Black*, 526 N.W.2d 132 (Wis. 1994) (holding that feticide statute did not apply to consensual abortions).

87. 410 U.S. 113 (1973).

88. *Id.*

89. *Id.* at 164.

90. *Id.* at 164-65.

91. *Wasserstrom*, *supra* note 17, at 687 (internal citation omitted). See also *supra* note 85.

92. 410 U.S. at 163.

93. *Id.*

wishes to protect a viable fetus, it may forbid abortion after the period of viability, “except when it is necessary to preserve the life or health of the mother.”⁹⁴ Subsequent to the *Roe* decision, state courts have upheld convictions under general homicide statutes for the death of an unborn, viable fetus.⁹⁵ In other jurisdictions however, the courts have held that prosecutors may maintain a conviction under general homicide statutes only if the legislature defines a fetus as a “person” or “human being” under the terms of the statute.⁹⁶

Not surprisingly, courts continue to debate over a parent’s legal obligation to protect fetal health. In 1931, the court in *People v. Yates*⁹⁷ resolved the issue of whether prosecutors could successfully charge a father with neglect of his unborn child. The father in *Yates* failed to furnish food, clothing, shelter, and other medical attendance to his unborn child’s mother.⁹⁸ The court held that the father had a duty to provide these necessary things to ensure the health of his unborn child by providing them for the mother.⁹⁹

Almost seventy years later, the South Carolina Supreme Court in *Whitner v. South Carolina*,¹⁰⁰ addressed whether the state could prosecute a mother for neglecting her unborn child. The unborn child’s mother ingested crack cocaine during her pregnancy and the state brought criminal neglect charges against her for her conduct.¹⁰¹ The *Whitner* court became the first high court of any state to hold that a viable fetus is a person within the meaning of its state child abuse laws.¹⁰² As a result of the *Whitner*

94. *Id.* at 163-64.

95. Wasserstrom, *supra* note 17, at 687. *See also* State v. Horne, 319 S.E.2d 703 (1984) (holding that in future cases the state may maintain an action for the murder of a viable fetus).

96. Wasserstrom, *supra* note 17, at 687. *See* State v. Holcomb, 956 S.W.2d 286 (Mo. Ct. App. 1997); State v. Coleman, 705 N.E. 2d 419 (Ohio App. 3d 1997); Cuellar v. State, 957 S.W.2d 134 (Tex. App. 1997).

97. *People v. Yates*, 298 P. 961 (Cal. Dist. Ct. App. 1931).

98. *Id.* at 962. By failing to provide the mother with food, clothing, and shelter, the father constructively failed to provide the same to his unborn child.

99. *Id.* at 963. The court supported its conclusion by stating that “every child, while in gestation, needs the materials from which to form bone, tissue, nerves and the other components of its bodily structure.” *Id.* Without these things, the court articulated, it “cannot grow or develop, or even continue to live.” *Id.* “It can receive these materials directly only from its mother, but in a very real, though indirect, sense they come from the food which the mother consumes, and that food is necessary for the child, as well as the mother.” *Id.* It is also necessary for the child’s welfare that the father provide the mother “with clothing and shelter, at least so far as the lack of these things might materially impair her ability to supply her child with the life-giving and body-building materials which the unborn child must derive from her.” *Id.* The unborn child is “dependent on its father for food, clothing and shelter, and he is subject to criminal prosecution for failing to furnish them.” *Id.*

100. 492 S.E.2d at 777. *See also supra* note 25.

101. *Id.* at 778.

102. Coady, *supra* note 25, at 678 n.50.

holding, some commentators have argued that health and social services professionals must guess whether “a pregnant woman’s failure to obtain prenatal care, to quit smoking or drinking, to stop taking over-the-counter medicine, or to refrain from playing rigorous sports constitutes unlawful behavior.”¹⁰³ Moreover, the dissent in *Whitner* criticized the majority for ignoring the “down-the-road” consequences of their holding,¹⁰⁴ which might potentially render a pregnant woman criminally liable for a “myriad [of] acts.”¹⁰⁵

III. MEDICAL EFFECTS OF TERATOGENS ON THE DEVELOPING FETUS

The medical community has long suspected that maternal drug use affects the fetus.¹⁰⁶ Many drugs, both legal and illegal, have lasting effects on the health of a developing fetus.¹⁰⁷ Of particular concern to the medical

103. Daniel N. Abrahamson et al., *Amicus Curiae Brief: Cornelia Whitner v. The State of South Carolina*, 9 HASTINGS WOMEN’S L.J. 139, 143 (1998).

104. 492 S.E. 2d at 788 (Moore, J., dissenting).

105. *Id.*

106. 1 ROBERT K. AUSMAN & DEAN E. SNYDER, AUSMAN & SNYDER’S MEDICAL LIBRARY 388 (lawyers ed. 1988).

107. *Id.* According to Ausman and Snyder, the following drugs of abuse have varied affects on the developing fetus:

Cocaine and Methamphetamine: These drugs have been found to cause an increased miscarriage rate and prematurity rate and decreased intrauterine growth, as well as increased rate of placental abruption with stillbirth . . . [I]f cocaine or methamphetamine is discontinued during the second and third trimesters, many of the problems can be avoided . . .

Marijuana: There is very little information on the effects of maternal marijuana use on the fetus and infant. In one study it was shown to have no effect of fetal birth weight nor prematurity rate.

Opiates (Methadone & Heroin): Infants of mothers who used heroin or methadone will initially show signs of acute narcotic withdrawal, including disturbed sleep [&] wake cycles, irritability, jitteriness, increased sucking and appetite, increased muscle tone and reflexes, vomiting, diarrhea, fever and seizures . . . [C]hildren of mothers who used heroin or methadone have altered breathing patterns with an increased length and frequency of APNEA (spells without breathing). This has been implicated as the reason these infants are at increased risk of dying from Sudden Infant Death Syndrome (SIDS).

Phencyclidine (PCP): PCP is a drug with sedative and hallucinogenic properties. Maternal use of PCP during pregnancy is associated with irritability, poor attention, poor feeding and neurologic abnormalities, including abnormal movements and muscle tone, tremors, decreased or abnormal reflexes, hearing and eye movements.

Id. at 389-90. Various prescription drugs also have varied affects on the developing fetus.

Anticoagulants (blood thinners): Exposure of the fetus [to the prescription drug Warfarin] may result in decreased growth of the nose and a bone abnormality . . . [] as well as brain abnormalities including decreased growth of the eye, mental retardation, delayed development, seizures and decreased growth of the brain.

Anticonvulsants (anti-epilepsy drugs): . . . A study of pregnant women with epilepsy who received treatment versus those who received no treatment showed that women [who treated their epilepsy had] twice the incidence of major [fetal] malformations such as cleft lip and palate,

community is the use by many pregnant women of tobacco,¹⁰⁸ alcohol,¹⁰⁹

congenital heart disease and brain abnormalities [The use of the epilepsy drug Phenytoin during pregnancy] is associated with a distinct syndrome known as Fetal Hydantoin Syndrome (FHS). The features of FHS include abnormal growth and development prenatally and postnatally with intrauterine growth retardation, mental retardation and developmental delay, craniofacial and limb abnormalities and others. All anticonvulsant medications are associated with a defect in blood clotting which may lead to hemorrhage inside the baby's head, chest or abdomen, of which one-third will not survive

Diazepam (Valium): When used by the mother during the last weeks of gestation, behavioral and brain chemistry changes are observed long after the drug has been excreted from the infant's body [resulting in] decreased Apgar scores (a system for scoring the well-being of a newborn) secondary to decreased tone, difficulty with body temperature regulation, poor feeding, increased spells of apnea (no breathing) and decreased stress tolerance.

Local Anesthetics: Local anesthesia is used commonly during labor and delivery and] includes local injections for episiotomy and pudendal block and epidural anesthesia. The drug effects on the fetus are constriction of blood vessels and depression of the heart's ability to contract. They cause a decreased fetal heart rate and intermittent decelerations on the fetal heart monitor. At one month of age, these babies were considered the more difficult and less socially responsive by their mothers.

Id. at 390-93.

108. See Kristin L. Johnson, Comment, An Argument For Consideration of Prenatal Smoking in Neglect and Abuse Determinations, 46 EMORY L.J. 1661 (1997).

109. See James Drago, Note, One For My Baby, One For the Road: Legislation and Counseling to Prevent Prenatal Exposure to Alcohol, 7 CARDOZO WOMEN'S L.J. 163 (2001). See also DAN J. TENNENHOUSE, ATTORNEYS MEDICAL DESKBOOK § 23:45, FETAL ALCOHOL SYNDROME (3d ed. 1993). Fetal alcohol syndrome (FAS) due to excessive alcohol intake during pregnancy may include some or all of the following findings:

1. Low birth weight and length.
2. Brain deficiency (microencephaly/failure of parts of the brain to develop).
3. Face anomalies (mid facial hypoplasia).
4. Diminished arousal.
5. Hyperactivity and tremulousness.
6. Delayed physical and mental development.
7. Developmental disabilities which do not improve with time.

Id. See also TENNENHOUSE, *supra* note 109, at § 13:11.1 (Alcohol is toxic to the fetus during gestation).

Alcohol interferes with early development of organ systems in the first trimester, brain development in the second trimester, and retardation of fetal growth in the third trimester. It is also associated with spontaneous abortion. The degree of injury to fetal development is directly proportional to the amount of alcohol consumed, but defects may occur even with as little as one drink per day. Alcohol ingestion during pregnancy may cause one or more of a group of fetal defects called "fetal alcohol effects. If ingestion is heavy, a characteristic triad of severe defects may result called "fetal alcohol syndrome" which has been described as occurring at a frequency of 25 per 1000 live births among women with chronic alcoholism. It is the leading cause of mental retardation in the United States. The average IQ for persons with fetal alcohol syndrome is 67.

In heavy drinkers, alcohol intake can disrupt menstrual cycles and prevent early recognition of pregnancy. Damage from alcohol ingestion may occur as early as the third week of gestation. This is part of the reason for the high incidence of fetal alcohol syndrome among women of childbearing age with chronic alcoholism. As a result primary care physicians are being cautioned to screen for early pregnancy in this patient population. Fetal alcohol effects include one or more of the following:

and hard drugs such as heroin¹¹⁰ and cocaine.¹¹¹ These drugs may produce

- a. Growth retardation before and after birth with low birth weight and shortened length.
 - b. Brain defects and mental development deficits, including the following:
 - (1) Developmental delay/mental retardation.
 - (2) Micrencephaly (small brain).
 - (3) Poor coordination and motor skills.
 - (4) Hyperactivity.
 - (5) Irritability.
 - (6) Disturbances of sleep-wake patterns.
 - (7) Speech problems and delayed language acquisition.
 - (8) Learning disorders.
 - (9) Poor verbal comprehension and visual recognition.
 - (10) Attention deficits.
 - (11) Psychosocial relationship difficulties such as social withdrawal, inappropriate emotional responses, and failure to consider the consequences of actions.
 - (12) Conduct problems such as lying, cheating and stealing.
 - c. Spinal defects such as spina bifida.
 - d. Craniofacial defects including the following:
 - (1) Eye defects such as myopia, strabismus, and ptosis.
 - (2) Various face and jaw deformities.
 - (3) Dental malocclusion and other dental abnormalities.
 - (4) Hearing loss.
 - e. Congenital heart disease, including the following:
 - (1) Septal defects.
 - (2) Great vessel defects.
 - (3) Tetralogy of Fallot.
 - f. Kidney disorders such as hydronephrosis and hypoplastic (underdeveloped) kidneys.
 - g. Hernias of the diaphragm, groin, and umbilicus.
 - h. Skeletal defects, including the following:
 - (1) Congenital hip dislocation.
 - (2) Flexion contractures.
 - (3) Foot defects.
 - (4) Pectus excavatum and other abnormalities of the thoracic cage.
 - i. Strawberry hemangiomas.
- Fetal alcohol syndrome (FAS) is an extreme form of fetal alcohol effects. It is characterized by all the following:
- (1) Central nervous system defects causing mental retardation.
 - (2) Craniofacial defects causing head and face deformities.
 - (3) Growth retardation

Id.

110. TENNENHOUSE, *supra* note 109, at § 23:47 Opiates During Pregnancy (1993). Use of opiates may produce the following effects on the infant:

- 1. Fetal death (especially if withdrawal occurred during pregnancy).
- 2. Prematurity.
- 3. Low birth weight.
- 4. Irritability.
- 5. Impaired motor skills.
- 6. Poor ability to interact with others.

neonatal addiction and withdrawal symptoms, as well as permanent conditions such as central nervous system abnormality, mental and physical retardation, hyperactivity, and respiratory disorders.¹¹² Furthermore, intravenous drug use by pregnant women has exposed numerous unborn children to the AIDS virus, thus adding fuel to the growing fetal rights fire.¹¹³

Teratogens are those substances that cause birth defects.¹¹⁴ Public awareness of the relationship between maternal drug use and its effects on the fetus has grown partly because of its association with the morning-sickness drug Thalidomide, which causes limb reduction malformations in newborns.¹¹⁵ Surprisingly, drug use during pregnancy is common, with ninety percent of all pregnant women using at least one prescription medication.¹¹⁶ Although the long and short term effects of any particular drug on a fetus vary greatly depending on the stage of pregnancy when the woman takes the drug, the frequency of drug exposure, and the level of drug exposure,¹¹⁷ there is little doubt that drugs are hazardous to unborn

7. Sudden infant death syndrome (SIDS).

Id.

111. TENNENHOUSE, *supra* note 109, § 23:46 COCAINE DURING PREGNANCY (1993). Use of cocaine may produce the following effects on the infant:

1. Prematurity.
2. Low birth weight and length.
3. Abruptio placentae.
4. Irritability.
5. Visual disturbances.
6. Organ system malformations.
7. Intestinal infarctions.
8. Brain infarctions.
9. Sudden infant death syndrome (SIDS).
10. Psychomotor impairment with loss of coordination.

112. Fleming, *supra* note 18, at 1085.

113. *Id.*

114. 49 AM. JUR. POF 2d 122 § 1 (explaining that a teratogen is a chemical agent that can cause birth defects). Several drugs have been proven teratogenic to the satisfaction of one or more courts. *Id.* at 133. Such drugs include Benedictin (anti-nausea medication taken by pregnant women, Delalutin (drug intended to prevent miscarriage), Ortho-Gynol (spermicide), and diethylstilbestrol (DES—"which may cause vaginal cancer in the daughters of DES mothers twenty years or more after intrauterine exposure"). *Id.* at 133-34. Drugs must be packaged with prescribed warnings. *Id.* at 134. The "Pregnancy Categories" A,B,C,D,X "range from no known risk in A to extreme and unjustifiable risk in X." *Id.* A high percentage of prescription drugs have known teratogenic effects. *Id.* at 135.

115. 1 AUSMAN & SNYDER, *supra* note 106, at 388.

116. *Id.* On average, drug use consists of three to five medications. *Id.* One decade ago, eighty percent of all prescription medications were not approved for use during pregnancy. *Id.*

117. Nova D. Janssen, Note, *Fetal Rights and the Prosecution of Women for Using Drugs During Pregnancy*, 48 DRAKE L. REV. 741, 746 (2000) (citing NIDA Conference of Women and Drug Abuse, 110 PUB. HEALTH REP. 517, 517-18 (1995)).

children.¹¹⁸

The use of drugs during pregnancy is most problematic during the first eight weeks of gestation.¹¹⁹ At this time, the fetus is extremely susceptible to harm because its organs are beginning to form in shape and location and a disruption of this process may lead to major malformations.¹²⁰ Additionally, during this time of greatest susceptibility, the woman typically has not yet seen an obstetrician.¹²¹

Drugs continue to have an impact on the fetus from the time of conception until birth,¹²² reaching the fetus by crossing the placenta.¹²³ If the drug-exposed fetus survives, it may continue to experience problems later in life.¹²⁴ This child will likely have a low birth weight, short birth length, and small head circumference.¹²⁵ If the unborn child is repeatedly exposed to drugs in utero, it will often go through painful withdrawals that can cause physical damage, mental retardation, or death.¹²⁶ The characteristics of withdrawal from both legal and illegal drugs include

118. *Id.* at 746 (citing JENNIFER R. NIEBYL, *DRUG USE IN PREGNANCY* 12 (2d ed. 1988)).

119. 1 AUSMAN & SNYDER, *supra* note 106, at 389. *See also* TENNENHOUSE, *supra* note 109, at § 23:41 (stating that a fetus cannot excrete or metabolize drugs well due to immaturity of organs such as the liver and kidneys). Drug effects on the fetus depend on the length of gestation and the drug concentration. *Id.* The most vulnerable time is during the laying down of organ systems in the first eight weeks of gestation. *Id.*

120. 1 AUSMAN & SNYDER, *supra* note 106, at 389. *See also* TENNENHOUSE, *supra* note 109, at § 23, *EFFECTS OF ABUSE SUBSTANCES TAKEN DURING PREGNANCY* (1993) (highlighting specific effects such as: (1) Prematurity; (2) Abruptio placentae; (3) Low birth weight; (4) Neonatal drug withdrawal (including tachycardia and hyperactivity); (5) Abnormal neurological and behavior patterns; (6) Poor neonatal weight gain; (7) Increased infections and sudden infant death during the first year of life; and 8) Deformity).

121. 1 AUSMAN & SNYDER, *supra* note 106, at 389.

122. TENNENHOUSE, *supra* note 109, at § 23:44 (Most or all drugs in the maternal blood stream reach the fetus to some extent). Drugs most likely to enter the fetal circulation in high concentration are those which are lipid soluble, non-ionized, or have a low molecular weight. *Id.* Drugs which easily enter the brain by crossing the “blood-brain barrier” such as opiates, alcohol and cocaine also easily enter the fetal circulation by crossing the “placental barrier”. *Id.* The mother’s liver partly metabolizes drugs taken orally, whereas drugs taken intravenously, intranasally, or by inhalation reach the placenta in higher concentration. *Id.*

123. 1 AUSMAN & SNYDER, *supra* note 106, at 389. During this fetal period,” teratogenic effects are greatly decreased because all organs, except the nervous system, have been formed into shape.” *Id.* Drugs may cause abnormalities in the cell growth of these organs and may disrupt nervous system growth and development of function. *Id.* Labor and delivery is also critical because drugs that were “previously METABOLIZED . . . in the [mother’s] liver must now be broken down by the immature [fetus’] liver as well.” *Id.* The half-life of a drug in a newborn becomes greatly prolonged, sometimes ten-fold. *Id.*

124. Janssen, *supra* note 117, at 747 (citing Ira J. Chasnoff et al., *Prenatal Drug Exposure: Effects on Neonatal and Infant Growth and Development*, 8 *NEUROBEHAV. TOXICOLOGY & TERATOLOGY* 357, 357-60 (1986)).

125. *Id.*

126. *Id.*

restlessness, irritability, poor feeding habits, difficulty in bonding with parents or caregivers, and a higher likelihood of death from Sudden Infant Death Syndrome.¹²⁷

IV. CONSTITUTIONAL PRIVACY AND FETAL RIGHTS

Historically, the United States' legal system has treated the fetus as part of the woman, without any rights separate from her.¹²⁸ The Supreme Court has "long held that the Constitution protects certain aspects of personal autonomy from state intervention" and has described the "right to be left alone" as "the most comprehensive of rights and the right most valued by civilized man."¹²⁹ In addition, the Court has described the right to be free from the government's control of one's physical person as the right to "personal privacy and dignity" and "bodily security and personal privacy."¹³⁰

However, nowhere in the Constitution can one find any explicit right of privacy.¹³¹ Nevertheless, the Court recognized for the first time that a constitutional right of personal privacy, or a guarantee of certain areas or "zones or privacy," existed in *Pacific Railway v. Botsford*.¹³² The issue in *Botsford* was whether, in a civil action for personal injury, the Court could order the plaintiff, without her consent, to submit to a surgical examination as to the extent of the injury for which she sued.¹³³ The Court answered in the negative and reasoned that "the right of every individual to the possession and control of his own person, free from all restraint and interference of others" is the most "sacred" and "carefully guarded" right.¹³⁴

In a line of cases beginning with *Griswold v. Connecticut*,¹³⁵ the Court has recognized the right to privacy in making reproductive decisions.¹³⁶

127. *Id.*

128. Dawn F. Johnsen, *The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy, and Equal Protection*, 95 YALE L.J. 599 (1986).

129. *Id.* at 614-15 (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

130. *Id.* (quoting *Winston v. Lee*, 470 U.S. 753 (1985); *Schmerber v. California*, 384 U.S. 757, 767 (1966)).

131. *Roe*, 410 U.S. at 152.

132. Drago, *supra* note 109, at 166 (citing *Pacific Railway v. Botsford*, 141 U.S. 250 (1891)).

133. *Botsford*, 141 U.S. at 251.

134. *Id.* However, the dissent argued that truth and justice are more sacred than any personal consideration and the courts may, in the interest of justice, require such personal examination to prevent wrong and injustice. *Id.* at 259 (Brewer, J., dissenting).

135. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

136. LARSEN, *supra* note 22, at 33.

The issue before the Court in *Griswold* was whether a Connecticut birth-control statute was unconstitutional given the fact that the right of privacy is not explicitly protected under the Constitution.¹³⁷ The Court found the statute, which criminally penalized “any person who uses any drug, medicinal article or instrument for the purpose of preventing conception[,]” an unconstitutional intrusion upon the right of marital privacy.¹³⁸ The majority concluded that the right to marital privacy concerned a relationship lying within a “zone of privacy” created by several fundamental constitutional guarantees.¹³⁹

Ensuing Supreme Court decisions developed “the right to autonomy in reproductive and familial decisionmaking.”¹⁴⁰ Although the issue of “marital privacy” was discussed in *Griswold*,¹⁴¹ the Court considered the issue of “individual privacy” in reproductive matters in *Eisenstadt v. Baird*.¹⁴² Specifically, the issue before the Supreme Court was whether providing dissimilar treatment for similarly situated married and unmarried couples violated the Equal Protection Clause of the Constitution.¹⁴³ The Court resolved an issue left open in *Griswold* by stating that since the distribution of contraceptives to married persons

137. *Griswold*, 381 U.S. at 479.

138. *Id.* at 480. In *Griswold*, a licensed physician and professor at Yale Medical School, who served as Medical Director for the Planned Parenthood League of Connecticut, along with Griswold, the Executive Director of the League, were arrested and charged with “giving information, instruction, and medical advice to married persons” as a means of preventing contraception. *Id.*

139. *Id.* at 485-86. The Court held that a “governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.” *Id.* at 485 (quoting *NAACP v. Alabama*, 377 U.S. 288, 307 (1964)). The Court further opined that it would be absurd to allow the police to search the “sacred precincts of marital bedrooms for telltale signs of contraceptives[.]” *Id.* Justice Douglas, writing for the majority, stated that the “penumbras” in the Bill of Rights created several “zones of privacy.” *Id.* at 484. For example the right of association contained in the penumbra of the First Amendment is a facet of that privacy. *Id.* at 483-84. The prohibition against the quartering of soldiers in a house during peacetime without consent is a privacy “right contained in the penumbra of the Third Amendment. *Id.* at 484. The right of the people to be secure in their persons, houses, papers and effects, against unreasonable search and seizures” is explicitly affirmed by the Fourth Amendment. *Id.* The zone of privacy created by the Fifth Amendment in its Self-Incrimination Clause, prohibits the government from forcing a citizen to surrender to his detriment. *Id.* The Ninth Amendment further provides that “certain rights [enumerated in the Constitution] shall not be construed to deny or disparage other [rights] retained by the people.” *Id.*

140. LARSEN, *supra* note 22, at 33.

141. *Griswold*, 381 U.S. at 480, 486-87 (Goldberg, J., concurring).

142. 405 U.S. 438 (1972). In *Eisenstadt*, the Court overturned Baird’s conviction for exhibiting contraceptive articles during a lecture on contraception and for giving away vaginal foam to an unmarried person after the lecture. *Id.* at 440. Baird was convicted under a Massachusetts’s law that stated only licensed physicians were allowed to give away contraception, but only to married people. *Id.* at 441.

143. *Id.* at 447.

cannot be prohibited, the same should be true for single people.¹⁴⁴ Therefore, after *Eisenstadt*, the right of privacy in reproductive matters became not just a marital right but an individual right as well.

The Court's decision in *Roe v. Wade*, holding that a Texas statute prohibiting abortion was unconstitutional,¹⁴⁵ was based on the conclusion that the decision to terminate a pregnancy fell within an individual's zone of privacy.¹⁴⁶ Despite the conclusion that a fetus is not a person under the Fourteenth Amendment,¹⁴⁷ the Court nevertheless held that states have an "important and legitimate interest in protecting the potentiality of human life."¹⁴⁸ Courts have also held that the right to privacy includes the right to protect one's autonomy from government interference (i.e., to protect the right to bodily integrity).¹⁴⁹ Accordingly, courts generally protect a patient's "autonomous" medical decisions even when the decision ultimately harms the patient.¹⁵⁰

Many hoped that *Planned Parenthood v. Casey*¹⁵¹ would overrule *Roe*

144. *Id.* at 453. The Court went on to state that "if the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Id.*

145. See *supra* notes 91-99 and accompanying text (discussing holding in *Roe v. Wade*).

146. LARSEN, *supra* note 22, at 33.

147. As a result of this finding, federal courts have routinely held that a fetus is not a person on whose behalf a civil action may be commenced pursuant to 42 U.S.C. § 1983 for a deprivation of rights. Richard P. Shafer, Annotation, *Fetus as Person on Whose Behalf Action May Be Brought Under 42 U.S.C.A. § 1983*, 64 A.L.R.FED. 886, 887 (2001).

148. *Roe*, 410 U.S. at 162.

149. Drago, *supra* note 109, at 168.

150. *Id.* (citing *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 284 (1990) (indicating that competent persons have a constitutionally protected liberty interest in refusing unwanted medical treatment); *Bee v. Greaves*, 744 F.2d 1387 (10th Cir. 1984), *cert. denied*, 469 U.S. 1214 (1985) (holding that a pretrial detainee retained a constitutional liberty interest in avoiding unwanted drug therapy, and that this interest could only be overcome in an emergency situation where no other less restrictive alternative exists); *Osgood v. District of Columbia*, 567 F. Supp. 1026 (D.C. 1983) (holding that a Christian Scientist patient's right not to be given anti-psychotic drugs could be overcome only by a compelling state interest if there was no reasonable and less intrusive alternative); *Pub. Health Trust v. Wons*, 541 So. 2d 96 (Fla. 1989) (denying a hospital's request for an order allowing administration of a life-saving blood transfusion based on religious reasons); *In re Farrell*, A.2d 404 (N.J. 1987) (holding that a thirty-seven year-old competent, pregnant woman with a terminal illness had a right to have her respirator removed, based on common law and constitutional principles which overrode state interests).

151. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). In *Casey*, abortion clinics and physicians challenged the constitutionality of five provisions of the Pennsylvania Abortion Control Act. *Id.* at 844. The Act required that a woman who wanted an abortion give her informed consent prior to the abortion procedure, and specified that she be provided with certain information at least twenty-four hours before the abortion is actually performed. *Id.* at 844. "For a minor to obtain an abortion, the Act requires the informed consent of one of her parents, but provides for a judicial bypass option." *Id.* Another provision required that, unless certain exemptions applied, a married woman seeking an abortion must sign a statement indicating that she has notified her husband of her intended abortion. *Id.* In addition, the Act imposed reporting requirements on facilities that provide abortion services. *Id.*

v. *Wade*.¹⁵² However, although the *Casey* Court upheld the principles enumerated in *Roe v. Wade*, it held that the trimester system was not practicable, and found that the state may regulate abortions after fetal viability as long as there is not an “undue burden” on a woman who wishes to obtain an abortion.¹⁵³

The common theme throughout these cases is that the courts must always weigh the interests of the state in protecting “potential life”¹⁵⁴ against an individual’s right to privacy.¹⁵⁵ One privacy right that would certainly be implicated by any fetal rights statute is the mother’s right to bodily integrity.¹⁵⁶ Another privacy right is the right to independently make familial decisions, especially those relating to the prenatal care of an unborn child.¹⁵⁷

For a state to justify imposing regulations upon an individual’s conduct, it must exhibit a “compelling state interest.”¹⁵⁸ To qualify as a “compelling state interest,” the state must meet three burdens.¹⁵⁹ First, the asserted state interest must be important and legitimate.¹⁶⁰ Second, the regulation must be substantially related to the goal as stated.¹⁶¹ Finally, the regulation must be the least intrusive means to achieve that end.¹⁶²

The Act exempted compliance with these requirements in the event of a medical emergency. *Id.*

152. *See* Drago, *supra* note 109, at 169.

153. *Id.* (quoting *Casey*, 505 U.S. at 874) *See also supra* note 42.

154. Some commentators assert that a potential life, or “future person,” has both the right to begin life with a sound mind and body, and the universal right not to be harmed. DEBORAH MATHIEU, PREVENTING PRENATAL HARM: SHOULD THE STATE INTERVENE? 27-28 (H. Tristram Engelhardt, Jr. et al. eds., 1996). It is not an easy task to determine whether harm to a future person outweighs the degree of invasion to a pregnant woman. *Id.* at 59. The magnitude of harm, probability that harm will occur, and probability that the state can prevent or remove the harm, are all factors the state must weigh when infringing on a pregnant woman’s rights. *Id.* The question of magnitude of harm involves the extent that the mother’s conduct will harm the future child and the extent the state will harm her bodily decisions. *Id.* Furthermore, “there should be ample evidence that there is a high probability of serious harm to the future child if the state does not intervene.” *Id.* at 60. Finally, intervention only makes sense if there is a high probability that the state can actually prevent or ameliorate the harm. *Id.* A pregnant woman should not have to make futile efforts or subject herself to especially risky or experimental measures. *Id.*

155. *See* Drago, *supra* note 109, at 170.

156. LARSEN, *supra* note 22, at 33.

157. *Id.* (citing *Carey v. Population Servs. Int’l*, 431 U.S. 678 (1977)).

158. *See* Drago, *supra* note 109, at 170.

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.* This framework was “established to prevent states from arbitrarily infringing upon protected liberty interests.” *Id.* “In addition, the behavior to be regulated must be clearly linked to the harm that the state is trying to prevent, and the harm must be likely and great.” *Id.*

V. ANALYSIS: SHOULD THE STATE INTERVENE DURING A WOMAN'S PREGNANCY?

A. *Advantages and Arguments in Favor of State Intervention During Pregnancy*

The rationale for protecting the unborn in tort law is simple: Justice demands recognition of a legal right of a child “to begin life unimpaired by physical, mental or emotional defects[.]”¹⁶³ Furthermore, the law protects an unborn child in the descent and devolution of property when the child is later born.¹⁶⁴ Because the areas of tort law and criminal law hold a third party liable for tortious acts committed against an unborn child, by analogy fetal rights laws should uniformly prescribe liability when a woman tortiously injures her unborn child.¹⁶⁵ Moreover, the common law bears no indication that it would withhold from an unborn child its “processes for the purpose of protecting and preserving the person as well as the property of the child.”¹⁶⁶ The analogy is clear then in tort law, for if the law protected an unborn child’s future property and not its future body, it would be “illogical, unrealistic, and unjust,” both to the child and to society.¹⁶⁷

State tort claims brought on behalf of children who are born alive, but later die as a result of prenatal injuries, are common.¹⁶⁸ There is no doubt that one who tortiously causes harm to an unborn child should be subject to liability for the harm especially *if the child is born alive*.¹⁶⁹ As the court in *Whitner* stated, “the consequences of [child] abuse or neglect which takes place after birth often pale in comparison to those resulting from abuse suffered by the viable fetus before birth.”¹⁷⁰ It would therefore be

163. 62A AM. JUR. 2D *Prenatal Injuries; Wrongful Life, Birth or Conception* § 10. See, e.g., *Cox v. Ct. of Common Pleas*, 537 N.E.2d 721, 729 (Ohio Ct. App. 1988); *Smith v. Brennan*, 157 A.2d 497, 504 (R.I. 1994); *Hall v. Murphy*, 113 S.E.2d 790, 793 (S.C. 1987). See also *Berger v. Weber*, 267 N.W.2d 124, 126 (Minn. 1995) (a child may sue a tortfeasor for negligently inflicted prenatal injuries, since a child has a right to begin life with a sound mind and body); *Keyes v. Construction Service, Inc.*, 165 N.E.2d 912 (holding that a manifest wrong should not go without redress). See also *supra* note 34 and accompanying text.

164. 62A AM. JUR. 2D *Prenatal Injuries; Wrongful Life, Birth or Conception* § 10.

165. *Id.*

166. *Id.* (citing *Tucker v. Howard L. Carmichael & Sons, Inc.*, 65 S.E.2d 909, 911 (1951)).

167. *Id.*

168. See *supra* notes 43-47 and accompanying text.

169. RESTATEMENT (SECOND) OF TORTS § 869(1) (1979) (emphasis added).

170. *Whitner*, 492 S.E.2d at 780. See also *supra* notes 25, 98-103 and accompanying text.

“incongruous” to bar otherwise valid causes of action, simply because the tortfeasor was the unborn child’s mother.¹⁷¹

In addition to tort law, there is little dispute that causing harm to a fetus during the commission of a federal felony should generally result in enhanced punishment, and courts have uniformly held that such enhancements are available under the current sentencing guidelines.¹⁷² Currently, in an assault in which a mother and unborn child are both harmed, state laws recognize both the injury to the mother and the unborn child, as opposed to federal law, which recognizes only the harm to the mother.¹⁷³ Under the Unborn Victims of Violence Act, however, the federal government could prosecute for harm to both victims.¹⁷⁴ For example, if an assailant commits a federal crime that injures a woman and kills her unborn child, he could be prosecuted for two crimes: assault on the mother, and manslaughter or murder of the baby.¹⁷⁵ Furthermore, several commentators argue that because the state may criminally convict a parent for subjecting a child to injury, so too should a woman be subject to criminal penalties for engaging in conduct that imposes injury on a fetus.¹⁷⁶

171. *Id.* at 786.

172. For example, in both *United States v. Peoples*, 1997 U.S. App. LEXIS 27067, 3-4 (9th Cir. 1997) and *United States v. Winzer*, 1998 U.S. App. LEXIS 29640, 2-3 (9th Cir. 1998), the courts held that assaulting a pregnant woman during a bank robbery could lead to a two level enhancement (approximately a twenty-five percent increase) under § 2B3.1(b)(3)(A) of the Guidelines relating to physical injury. In *United States v. James*, 139 F.3d 709, 714 (9th Cir. 1998), the court held that a pregnant woman may be treated as a “vulnerable victim” under § 3A1.1(b)(1) of the Guidelines, again leading to a two level sentencing enhancement for the defendant. And in *United States v. Manuel*, 1993 U.S. App. LEXIS 14946, 5-6 (9th Cir. 1993), the court held that the defendant’s prior conviction for assaulting his pregnant wife warranted an upward departure from the applicable guideline range for his subsequent assault conviction. *See also The “Unborn Victims of Violence Act:” United States Sentencing Commission before the Subcommittee on the Constitution of the House Committee on the Judiciary on H.R. 504th Cong. § 8140(a) (1999) (testimony of Ronald Weich, Former Special Counsel), available at <http://www.house.gov/judiciary/weic0721.htm> (last visited Jan. 9, 2003).* “The federal cases that already treat fetal injury as a relevant factor for establishing criminal liability or enhancing the defendant’s sentence are consistent with a much larger body of state cases.” *Id.* Indeed, these state cases, reveal that the issue of criminal liability for fetal injury is one that Anglo-American law long ago addressed and resolved in a common sense way. *Id.* “Several states, such as Georgia and Illinois, have enacted feticide statutes, but in other states the governing common law rule is that assaulting a pregnant woman and thereby causing the death of a viable fetus gives rise to criminal liability.” *Id.*

173. *Supra* note 78-79.

174. *Id.*

175. *Id.*

176. LARSEN, *supra* note 22, at 43. These commentators argue that the state should intervene before the woman injures her fetus. *Id.*

In the realm of medicine, the federal government has calculated that the average healthcare costs of a drug-exposed fetus total about one million dollars.¹⁷⁷ When a woman exposes her fetus to drugs, hospital charges for the infant are almost four times greater than they are for drug-free infants.¹⁷⁸ Commentators have therefore urged that the state should provide adequate medical care for fetuses that will be brought to term.¹⁷⁹ In accordance with this belief, President George W. Bush recently announced a plan that would allow states to provide prenatal care to low-income women, thus recognizing the right of a fetus to receive adequate medical care.¹⁸⁰

Addressing constitutional issues, fetal rights advocates argue that a pregnant woman's use of tobacco, alcohol, and illicit drugs are not "fundamental rights" under the Constitution.¹⁸¹ Furthermore, states may prohibit post-viability abortions "except where necessary to protect the health and life" of the woman.¹⁸² Therefore, after a fetus reaches viability, the state should be permitted to prohibit a woman from engaging in certain types of maternal conduct that harms the child.¹⁸³ Thus, the state should have the right to restrict a pregnant woman's use of these substances when such use presents a serious risk of harm to her unborn child.¹⁸⁴ In other words, the greater the probability of harm to the unborn child, the greater the right the state has to intervene.¹⁸⁵ Advocates of state intervention argue that the child has an interest not to be injured, and this outweighs a woman's interest in using both illegal and legal drugs during pregnancy.¹⁸⁶ Moreover, as the plurality in *Webster* noted, the state has a compelling state interest in protecting potential human life throughout the woman's pregnancy.¹⁸⁷ Thus, the state has a compelling interest in protecting the health of potential life just as it has a compelling interest in preserving the life itself.¹⁸⁸

177. Nancy Kubasek, *The Case Against Prosecutions for Prenatal Drug Use*, 8 TEX. J. WOMEN & L. 167 (1999).

178. Califano, *supra* note 21.

179. *Supra* note 19.

180. *Id.*

181. LARSEN, *supra* note 22, at 43.

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. *Webster*, 492 U.S. at 519-20. *See also supra* note 42.

188. *Webster*, 492 U.S. at 519-20.

B. Disadvantages of State Intervention During Pregnancy

There is a long-range economic burden when the state incarcerates women instead of treating them.¹⁸⁹ In addition, women in prison “face conditions hazardous to fetal health, including overcrowding, poor nutrition, and exposure to contagious disease.”¹⁹⁰ Moreover, prenatal care in prison health facilities is generally nonexistent.¹⁹¹ For incarcerated mothers with drug histories, the sudden withdrawal of their drug supply may bring about physiological changes that may ultimately endanger both the mother and the child.¹⁹²

Additionally, because drug use during pregnancy is common,¹⁹³ the legal system may not be able to handle the large amount of prosecutions—there may not enough jail cells, prosecutors, or courts.¹⁹⁴ Another concern is that the prosecution of pregnant mothers may “turn obstetricians into full-time witnesses.”¹⁹⁵ Moreover, even if the state places a pregnant mother in jail, illicit drugs may still be readily available¹⁹⁶ and consequently, there may be no guarantee that the drug use will ever cease once a woman is incarcerated.¹⁹⁷

Commentators also note that criminalizing prenatal behavior that endangers the health of a fetus may lead to absurd, unintended, and dangerous results.¹⁹⁸ For example, there may be a breach in the doctor-patient relationship if the physician must report any activity that may endanger the welfare of a fetus.¹⁹⁹ Furthermore, at the time when a fetus is most susceptible to drug exposure, a woman may not know she is pregnant.²⁰⁰ Moreover, if a pregnant woman, who is addicted to a drug

189. Heather Flynn Bell, Comment, *In Utero Endangerment and Public Health: Prosecution vs. Treatment*, 36 TULSA L.J. 649, 658 (2001).

190. Enid Logan, *The Wrong Race, Committing Crime, Doing Drugs, and Maladjusted for Motherhood: The Nation's Fury Over "Crack Babies,"* 3/22/99 SOC. JUST. 115 (1999), available at 1999 WL 25869921 (internal quotations omitted).

191. *Id.*

192. *Id.*

193. See *supra* notes 21 and 116 and accompanying text.

194. LARSEN, *supra* note 22, at 44.

195. *Id.*

196. Logan, *supra* note 190.

197. *Id.*

198. *Supra* note 40.

199. See Cheryl M. Plambeck, *Divided Loyalties: Legal and Bioethical Considerations of Physician-Pregnant Patient Confidentiality and Prenatal Drug Use*, 23 J. LEGAL MED. 1, 21-28 (2002).

200. 1 AUSMAN & SNYDER, *supra* note 106, at 389.

harmful to her fetus, knows that she may be subject to criminal charges if she seeks prenatal care, she may opt for an abortion or may avoid seeking the prenatal care altogether.²⁰¹

Finally, additional criminal penalties do not address the problems underlying drug addiction.²⁰² To a large extent, drug addiction is a socioeconomic problem and any solution that does not address the factors that have created the problem in the first place will most likely fail.²⁰³

Thus, criminalization may not have the desired effect necessary to outweigh the intrusion on a mother's constitutional rights.²⁰⁴ As one observer noted, "it is an addicted woman who becomes pregnant, not a pregnant woman who becomes addicted."²⁰⁵

VI. FETAL RIGHTS CENTERED PROPOSAL: TREATMENT FIRST, CRIMINALIZATION LATER

Any attempt to increase legal protection for unborn children will have to balance the pregnant woman's constitutional rights on one hand against the state's interest in protecting the potential life of a fetus, on the other.²⁰⁶ Any statute creating rights in a fetus to be free from maternal abuse will certainly be subject to strict scrutiny because it will infringe on the woman's right of privacy and interest in maintaining bodily integrity.²⁰⁷ Therefore, if the state wishes to regulate a pregnant woman's actions, it must do so skillfully. To survive a constitutional challenge, any statutes must be narrowly tailored to preserve family units, protect maternal rights, and limit state intervention to those instances where there is no alternative way to protect the child.²⁰⁸

The United States' legal system has fully developed tort law in terms of allowing a born alive fetus recover for prenatal injuries inflicted upon it by third parties.²⁰⁹ For example, imagine a drunk driver who smashes a car

201. LARSEN, *supra* note 22, at 44.

202. *Id.* For instance, there are currently insufficient drug treatment programs developed for pregnant mothers. *Id.*

203. *Id.*

204. *Id.*

205. Kathryn T. Jones, Note, *Prenatal Substance Abuse: Oregon's Progressive Approach to Treatment and Child Protection Can Support Children, Women, and Families*, 35 WILLAMETTE L. REV. 797, 797 (1999) (citing Hearing on H.B. 2388 Before the House Judiciary Comm. on Family, 66th Leg. (Or. Mar. 11, 1991) (Exhibit A: Howard Klink, Multnomah County Department of Human Services, Position Paper, Prenatal Drug Testing)).

206. See LARSEN, *supra* note 22, at 31

207. *Id.* at 32. See also Part IV and accompanying text.

208. *Id.*

209. *Id.*

into a wall. As a result of this crash a pregnant woman dies. However, her viable unborn child survives but the crash has left him or her permanently handicapped. Current tort law may allow the fetus to recover if a third party caused its prenatal injuries.²¹⁰ Justice demands the fetus should recover, even if its mother was the drunk driver who crashed the car into the wall.²¹¹

In the civil context, if a woman intentionally or negligently harms her fetus, then the woman should be liable for damages to her fetus, born or unborn, viable or not viable. Negligence could be expressed as “failing to take reasonable steps to ensure her fetus is born in good health.”²¹² Because courts have progressively held third parties to a standard of care when dealing with a pregnant woman, it is time to also hold pregnant women to the same standard of care that other reasonable pregnant women would do to their bodies and their fetuses.

In the realm of criminal law, courts may protect the fetus from third persons, and these protections are constitutionally justifiable.²¹³ From the standpoint of the fetus as a “future person,”²¹⁴ it makes sense to prosecute a third party attacker for stabbing a pregnant woman in her abdomen. Taking the “future person” argument one step further, it also makes sense to prosecute a woman, who has decided not to exercise her constitutional right to an abortion, for inflicting these injuries herself in order to kill her fetus, especially if the unborn child was born alive and later died.

A model criminal statute should avoid the antiquated “born alive” requirement, issues of viability, and should not exempt maternal conduct. It may resemble the following: when injury or death to an unborn child was intentional or resulted from willful misconduct or an evil mind, whether or not characterized as malice, the applicable criminal penalty shall apply. It should not, and indeed it is time for the law to recognize, that it does not matter *who* kills the unborn child of a woman who has decided to carry her child to term.

Proven scientific data details how drugs affect the developing fetus.²¹⁵ If the judicial system can hold a doctor civilly liable for damages inflicted upon the fetus or upon the mother before she conceives as recoverable,²¹⁶

210. *Id.*

211. *See supra* note 36.

212. ETHICAL ISSUES IN MATERNAL-FETAL MEDICINE, *supra* note 34, at 134.

213. *See supra* notes 83-85 and accompanying text.

214. *See supra* note 58 and accompanying text.

215. *See supra* Part III.

216. *Supra* note 34.

then courts should allow a fetus to recover for injuries resulting from the mother's abuse of drugs, or negligent use of drugs while pregnant.

Once a woman has exercised her constitutional right to carry her child to term, she must accept the consequences of that choice. One consequence is the legal duty to prevent harm to the child, exactly as if the child were born and alive. The argument that the woman has a constitutional right to privacy fails because a woman is not only affecting her body she is affecting her "future child's" body. Of course, fetal rights proponents will never be able to sway those who believe that a fetus is not a "future person." Admittedly, there exists much variation, and there are many gray areas, within the spectrum of exactly what constitutes a "future person." On one end of the spectrum is the healthy one-day-from-being-born "fetus" on the other end is the one-day-old embryo. However, fetal rights opponents simply need to use common sense to be able to hold that both of these "future persons" should be protected.

VII. CONCLUSION

Fetal abuse laws targeted toward pregnant mothers will work. First, the state must encourage pregnant mothers who abuse drugs and have yet to attempt rehabilitation to do so. Because abortion is rightly legal, the concern must not be with how many abortions women are having. Instead, the state's concern must sincerely lie with ensuring the health and well being of those future children. Importantly, legislators and courts cannot strike fear into the pregnant woman, prompting an avoidance of prenatal care altogether or an increase in the incidents of abortions and abandoned babies.²¹⁷

The goal is to protect the fetus, but not at all costs. The mother has rights (which are limited once she becomes pregnant and decides to forego an abortion) that the state must always protect. This protection should come in the form of increased treatment facilities, deterrence options that avoid prison as punishment, and focus more on counseling and community service projects to educate newly pregnant women of the dangers of fetal abuse, and leniency on the part of state legislators who wish to punish even more poor, uneducated women.

There is no doubt that the maternal duty to protect the health of her unborn child will be the subject of much controversy for some time. As one court recently noted, "the extent to which the unborn child is to be

217. LARSEN, *supra* note 22, at 44.

accorded the legal status of one already born is one of the most debated questions of our time[.]²¹⁸”

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218. Commonwealth v. Jeffery Robert Booth, 766 A.2d 843, 845 (Pa. 2001) (quoting People v. Greer, 402 N.E.2d 203, 208 (1980)).

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